

AMERICAN
CORPORATIONS

JOHN J. SULLIVAN

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**AMERICAN
CORPORATIONS**

BY THE SAME AUTHOR

AMERICAN BUSINESS LAW: WITH LEGAL FORMS

By JOHN J. SULLIVAN, A.M., LL.B.

Instructor in Business Law at the University of Pennsylvania and Member of the Philadelphia Bar

12mo. Cloth, \$1.75 net

This book is intended for use as a text-book for students taking a course in business law, and to answer many of the practical, legal questions which confront business men. Attention has been given to the character of the business law courses offered in the leading institutions of learning throughout the country, and the work will be found exceptionally adapted for use as a text-book. To make it more useful in the class-room, a set of questions has been appended to each chapter, and a number of forms introduced in appropriate places.

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CHICAGO

AMERICAN CORPORATIONS

THE LEGAL RULES GOVERNING CORPORATE
ORGANIZATION AND MANAGEMENT
WITH FORMS AND ILLUSTRATIONS

BY

JOHN J. SULLIVAN, A.M., LL.B.

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OF PENNSYLVANIA AND MEMBER OF THE
PHILADELPHIA BAR



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TO
MY FATHER

P R E F A C E

OF late years no topic has attracted more public notice than that of corporations. Not only has the interest in corporations been deep and widespread, but it has been kept alive and indeed increased over a long period. Questions of especial moment to business men, as well as grave social and political questions affecting the entire community, center upon the solution of certain corporation problems.

Accordingly, it is thought that the present volume may appeal to a large number of general readers who are concerned about any matter of current note, as well as to those whose daily affairs bring them into contact with corporations. The aim has been, therefore, to combine a clear statement of practical rules of corporation law with a discussion of the broader principles governing it. While the information given is sought to be made as definite as the limits of a small volume will permit, care has been taken to keep the book from being a mere manual of statistics. To this end, a quantity of detailed information is relegated to the appendices. Numerous illustrative cases have been inserted at appropriate points throughout the work in order to explain the text and to quicken the reader's sense of its personal application.

The volume is divided into ten parts. Part I deals with the formation of corporations. Part II deals with their powers. In Part III is treated the management of corpora-

tions by the directors and officers. Part IV discusses the relation of stockholders and other corporate members toward the company. Part V takes up the liability of corporations under contracts, and for torts and crimes. In Part VI we come to the dissolution of corporations. Part VII considers the topic of merger and consolidation, which is so prominent nowadays in the public eye. Part VIII covers the rights and liabilities of a corporation coming from one state of the Union into another. In Part IX certain special types of corporations are treated, such as municipalities and public service companies. Finally, in Part X a study is made of various statutory partnerships which, although unchartered, resemble corporations.

A number of approved forms are to be found in various chapters. These include forms of stock certificates, notices to stockholders, proxies, etc. For the benefit of teachers, a set of questions has been appended to each chapter. The growing attention to the study of corporation law in colleges and universities has led to the introduction of this feature, besides guiding the author in his general treatment of the subject. It is hoped that the book will commend itself to the teaching profession.

In the writing of "American Corporations," valuable aid has been given by Francis H. Shields, Esq., F. Markoe Rivinus, Esq., Miriam McConnell, Esq., and Joseph A. Keough, Esq., all members of the Philadelphia Bar. To their efforts is due much of whatever merit this volume may have.

JOHN J. SULLIVAN.

LAND TITLE BUILDING, PHILADELPHIA.

September 17, 1910.

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AMERICAN CORPORATIONS

CHAPTER I

NATURE AND CLASSIFICATION OF CORPORATIONS

• (A) The nature of corporations

1. A corporation is a body consisting of one or more natural or artificial persons established by law, usually for some specific purpose or purposes, and continued by a succession of members.

2. Most corporations consist of a number of individuals. But, as appears from the foregoing definition, there may be a corporation with only one member. This happens where all the stock of a business corporation is transferred to a single person. If this person is a man or woman, the corporation then consists of one natural person. If all the stock of a corporation is transferred to another corporation, the former company then consists of a single artificial person, for its sole member is a creature of the law.

3. The words "established by law" in the foregoing definition show that a corporation is brought into existence under a grant from some lawgiver. Such grants were formerly made, one at a time, by the United States Congress and by the legislatures of the various states. But, to-day, almost all the corporations that are being formed get their charters under general laws. These general laws usually grant equal privileges to any number of associations which

may choose to become incorporated thereunder, and which comply with the legal requirements.

4. The words "usually for some specific purpose or purposes" in the foregoing definition, show that a corporation is generally established by law in order that it may fulfill one or more designated objects.

5. The words "continued by a succession of members," show that a corporation is not necessarily identified with any particular person or persons. Its existence usually continues even though one or more of its members may retire, become bankrupt or insane, or die. Despite changes in membership the corporation is deemed to remain the same. For this reason Blackstone likens a corporation to the River Thames, which is still the same river, though the parts composing it are changing every instant.

(B) The classification of corporations

6. Corporations are either public or private. Some private corporations which are brought into close contact with the public at large are called semi-public corporations. For instance, railroad companies and canal companies are semi-public corporations. But such companies are properly included in the list of private corporations, because they are organized by private individuals, with private capital, and for private profit. See Section 9.

7. A public corporation is one formed to help carry out a plan of government. Certain public corporations owe their existence exclusively to the will of the legislature creating them. For instance, a city is sometimes incorporated by the legislature of the state wherein it is located without any action on the part of the citizens themselves, although these citizens become the members of the corporation. Likewise, public corporations are occasionally altered, divided, or combined without asking the consent of the

members. Such corporations are mere instrumentalities or agents of the sovereign power, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are treated at length in Chapter XXX. Akin to public corporations are certain territorial divisions of a state or nation which, without being corporations at all, resemble public corporations in certain respects. These are called *quasi* corporations. They are treated in Chapter XXXI. A county is a familiar example of *quasi* corporation.

8. All corporations except those mentioned in the preceding section are private corporations. These may be divided into, first, corporations organized to secure a direct pecuniary profit for their members; and, second, corporations organized for other purposes. The first class may be roughly described as business corporations. The second class includes a great variety of concerns organized for religious, charitable, educational, social, sporting, and many other purposes. They are treated in Chapter XI.

9. Corporations organized to secure a direct pecuniary profit for their members consist of (a) purely private business companies, such as manufacturing or trading companies, and (b) semi-public companies which are referred to in Section 6. Semi-public corporations are subject to many special regulations. They are treated in Chapter XXIX. Purely private business corporations constitute the majority of all corporations, and with such concerns this book is mainly occupied. The statements made throughout the book are to be understood as referring to purely private business corporations, unless the context indicates otherwise.

10. Corporations must not be confused with limited partnership associations, although the latter resemble corporations in many respects. See Chapter XXXII. Again, corporations must not be confused with any of the hundreds

of different unincorporated societies, syndicates and other forms of combination, some of which are properly called "companies" although, being unchartered, they are not corporations.

Summary

All corporations are divided into two classes:

I. PUBLIC CORPORATIONS,

including cities and some towns, but
excluding counties, road districts, etc. These latter are not really corporations but are called *quasi* corporations.

II. PRIVATE CORPORATIONS,

including (a) corporations organized for their members' direct pecuniary gain (which are subdivided into purely private business companies and semi-public companies), and (b) corporations organized for other purposes, as social clubs, religious corporations, etc., but
excluding limited partnership associations and other unchartered companies, societies, etc.

QUESTIONS

1. Define a corporation. May there be a corporation with only one member?
2. By what governmental authority is a corporation created?
3. What do the words "continued by a succession of members" in the definition mean? To what does Blackstone liken a corporation?
4. Define and give examples of the following kinds of corporations: public; private; *quasi*; semi-public.

PART ONE

FORMATION OF CORPORATIONS

CHAPTER II

WHERE TO INCORPORATE

11. The power to create corporations resides in the sovereign. It is exercised by the legislative department of government. Hence, corporations formed according to United States laws are chartered under enactments framed by the National Congress. Corporations chartered under the laws of one of the states are formed under legislative enactments of that particular state.

12. While the power to create corporations is vested in the legislatures, it must be so exercised as not to conflict with constitutional law. In some of the state constitutions are found numerous provisions regarding the formation and the management of corporations. Such provisions limit the legislative power in these matters.

13. The formation of every corporation should be traced to some legislative act. Formerly corporations were chartered one by one. The statute creating a corporation usually named the persons who were to band together, and conferred upon them and their successors the privilege of associating as a corporation.

14. Nowadays business conditions require the formation of so many corporations that the legislatures would be overtaxed were it necessary to pass a special act for the creation of each single corporation. Besides, the granting of special charters has fallen into disfavor because it is opposed to equality of privilege. Most state constitutions

have curtailed or utterly abolished the legislative power to grant special charters.

15. Accordingly, all the states of the Union have general statutes regulating the formation of corporations. These statutes prescribe the conditions upon which a charter may be obtained, and delegate to the governor or some other state official the work of passing upon each application for a charter and granting the application if the legislative requirements have been fulfilled. See Chapter III.

16. When people are planning to form a corporation, it is natural for them to seek a charter from that state wherein the corporation will have its chief place of business. But various reasons may, perhaps, lead them to incorporate under the laws of some other state. It is important at the outset to glance at some of the considerations which may influence the decision one way or another. These may be grouped under three heads: (*a*) the powers which it is desired to obtain for the corporation; (*b*) the initial cost of the charter and the charges which will have to be met from time to time in the future; (*c*) the duration, the certainty, and the safety of the charter. These things will be briefly treated in the following three subdivisions.

(A) What corporate powers are desired

17. If a corporation is to be formed to carry on a certain business, of course a charter must be sought from a state which creates corporations for the transaction of that business. The laws of most states allow corporations to be formed for doing almost any kind of business, but this is not true of all the states.

18. Under the laws of some states a corporation must confine itself to a single line of business. Therefore, if it is desired to incorporate for two or more distinct purposes,

a charter should be obtained from a state which permits this to be done.

19. Many corporations, especially those of a semi-public nature, require certain extraordinary powers or franchises. For instance, the right of eminent domain is often needed by railroad companies in order that they may run their tracks directly to the point of destination. See Section 489. Again, many street railway, telegraph, and other companies need to occupy the public highways with their tracks, poles, etc. Now such extraordinary powers are often exercisable within a state only by corporations chartered under the laws of that same state. Again, in the matter of land ownership, most states favor domestic corporations over those crossing the border line from another state by restricting such foreigners, or even totally denying to them the power to buy and hold land. Local favoritism in these and other matters often drives incorporators to seek a charter from the state wherein they intend to do business, although otherwise they might apply elsewhere.

20. Corporations chartered under the laws of certain states are limited in their power to incur indebtedness, and to issue stock, while the laws of other states are more liberal. Again, the laws of some states provide for more different kinds of shares (as, for instance, preferred, deferred, and special shares) than the laws of other states. Some states require that a certain amount of the authorized capital be paid in cash to the corporation before it can begin business. These and similar provisions against stock watering appeal to certain promoters but are not liked by all. In brief, incorporators should weigh carefully the powers which a charter granted by this or that state will confer, as well as the greater or less facility with which such powers can be exercised.

(B) The cost of a charter, first and last

21. The initial cost of a charter usually varies in accordance with the amount of capital stock which the corporation is authorized to issue. But in a few states there is a flat charge for charters, no matter what the amount of authorized capital. In addition to the price, called the bonus, which a state charges for a charter, usually various filing and recording fees must be paid. There is, then, a wide difference in the laws of the several states as respects the original cost incident to incorporating. See Chapter III.

22. Many states require corporations formed under their laws to pay an annual tax, based ordinarily on the amount of capital authorized or actually outstanding. Moreover, many states require the annual filing of a report, and in some cases a filing fee must be paid. Such recurrent trouble and expense often cause incorporators to seek their charter from a state which is more lenient in these matters.

23. Where a corporation, chartered in one state, does business in another, it must satisfy the requirements of both states. Some states, in order to put domestic corporations on an even footing with foreign ones, make the latter pay a bonus, based usually on the amount of capital which a foreign corporation employs in the state where payment is required. See Section 21. Moreover, such foreign corporations are in most states forced to maintain a local office, to file certain papers with some designated state official, and in certain instances to pay annual taxes. See Chapter XXVIII. These considerations frequently persuade incorporators to secure a charter from the state where they expect to do business, even though at the outset it may cost more than a foreign charter.

(C) Duration, certainty and safety of the charter

24. Most corporations enjoy perpetual charters. But often a perpetual charter may be lost by abandonment or such default on the part of the corporation as subjects it to forfeiture. Some states grant charters only for a limited number of years. When the time limit of such charters expires, renewal proceedings may usually be taken. Nevertheless, a perpetual charter is far preferable, other things being equal, for a company's officers may neglect to renew a limited charter at the proper time. Again, should they promptly take renewal proceedings, there are always some slight risks and expenses attendant thereon.

25. The corporation laws of some states are more certain than others. It is an advantage to get a charter from a state whose statutory enactments are full and clear. Moreover, those statutes which have been definitely construed and held constitutional by the highest local courts are more certain than similar statutes which have never been judicially interpreted or sustained.

26. Most investors prefer a charter granted by a conservative state to a cheaper charter secured from a state whose authorities are inclined to experiment. If the executive, legislative, or judicial branch of a state government is disposed to harass corporations, this has a bad effect on all the companies whose charters have been secured from such state.

27. The laws of most states impose little or no financial obligations on stockholders whose shares are full paid. But in some states, the stockholders of an insolvent corporation are under a heavy additional liability. See Chapter XX. Besides, some states are more severe than others in penalizing the officers and directors of a corporation for failure to comply with the local requirements. In brief, the system of corporate regulation established in each state differs

more or less from that established in every other state, and any point of difference may have weight with promoters in view of their particular plans.

QUESTIONS

1. What is the difference between a general act and a special act creating corporations?
2. Why is a general act better than a special act?
3. Name three points to be considered in deciding on where to incorporate.
4. What are some of the powers which are granted to corporations by some states and denied by others?
5. With what does the cost of a charter usually vary?
6. How do some states try to put domestic corporations on an even footing with foreign ones doing business in the state as regards state charges?
7. Why is a perpetual charter better than one for a limited period of time?

CHAPTER III

SECURING THE CHARTER

28. In all the states and territories general corporation laws exist, prescribing a way in which a number of persons may associate for the purpose of securing a corporate charter. Usually three is the minimum number of associates fixed by law. The procedure, generally, is for the incorporators to sign and acknowledge, in a prescribed way, an application for a charter, which is then forwarded to a designated state official, generally the Secretary of State. Certain facts, such as the name of the proposed corporation, its purpose, duration, principal place of business, the amount of its capital stock, the names and addresses of the subscribers to the stock, together with the amounts of their subscriptions and other matters, are usually required to be set forth in this application. In many states public notice, by advertisement, of the intention to apply for a charter and of the purposes for which the corporation is to be formed must also be given.

29. This matter is discussed at length in Appendix A, toward the end of this volume. There one may see what steps must be taken to secure a charter in each of the several states, as well as in the District of Columbia, the territories and some of the insular possessions.

30. Moreover, the cost of obtaining a charter in the various states is treated in Appendix A. But, of course, no such statement of costs will be complete unless one makes

allowance for an attorney's fee and for the various other expenses incident to incorporating, which vary with the needs of each particular company. Notary's fees, the cost of advertising notice of the charter application and of buying a corporate seal, a stock certificate book, etc., should all be taken into consideration.

31. If the Secretary of State, or other examining official, finds that the application complies with the corporation laws of the state, and that the required fees have been paid, he issues to the applicants a document, creating the corporation, which is called a charter, a certificate of incorporation, or letters patent. This document must usually be recorded in a designated state office, such as that of the Secretary of State, and also in the office of the register or recorder of deeds of the county where the corporation's principal place of business in the state of its origin is to be located. Such recording gives the public an opportunity to look up the corporation.

32. The following is a form of application for a charter under New Jersey laws. In most states the application is not quite so lengthy. Indeed, even in New Jersey a shorter form is often used, although some applications are much longer than the following:

THE
LYNCH CONTRACTING
COMPANY.

Certificate of Incorporation

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act Concerning Corporations (Revision of 1896)," and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

I. The corporate name is *The Lynch Contracting Company*.

II. The registered office of the corporation is 417 Market Street, Camden, New Jersey, and the New Jersey Corporation Guarantee & Trust Company is designated as the statutory agent therein, in charge thereof, and upon whom process against the corporation may be served.

III. The objects for which the corporation is established are primarily:

To make, enter into, perform, and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners, and others; to carry on in all their respective branches the business of builders, contractors, decorators, dealers in stone, brick, timber, hardware, and other building materials or requisites; to purchase for investment or resale, and to sell

houses, lands, real property of all kinds and any interest therein, and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and any other property, whether real or personal.

As subsidiary to and in connection with the foregoing from time to time the corporation may:

Manufacture, purchase or otherwise acquire goods, wares, merchandise and personal property of every class and description, and hold, own, mortgage, sell or otherwise dispose of, trade, deal in and deal with the same.

Acquire and undertake the good-will, property, rights, franchises, contracts and assets of every manner and kind and the liabilities of any person, firm, association, or corporation, either wholly or in part, and pay for the same in cash, stock or bonds of the corporation, or otherwise.

Enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation.

Issue bonds, debentures or obligations of the corporation, and at the option of the corporation secure the same by mortgage, pledge, deed of trust or otherwise.

Acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage, or otherwise dispose of letters patent of the United States or any foreign country, patents, patent rights, licenses and privileges, inventions, improvements and processes, trade-marks and trade names, relating to or useful in connection with any business of the corporation.

Hold, purchase or otherwise acquire, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock and bonds, debentures or other evidences of indebtedness created by any other corporation or corporations, and, while the holder thereof exercise all the rights and privileges of ownership, including the right to vote thereon.

Purchase, hold and reissue the shares of its capital stock, its bonds or other securities.

Remunerate any person or corporation for services rendered, or to be rendered, in placing or assisting to place or guaranteeing the placing or underwriting of any of the shares of stock of the corporation, or any debentures, bonds or other securities of the corporation, or in or about the formation or promotion of the corporation, or in the conduct of its business.

With a view to the working and development of the properties of the corporation, and to effectuate, directly or indirectly, its objects and purposes, or any of them, the corporation may, in the discretion of the directors, from time to time carry on any other lawful business, manufacturing or otherwise, to any extent and in any manner not unlawful.

The corporation may conduct business in the State of New Jersey and elsewhere, including any of the states, territories, colonies or dependencies of the United States, the District of Columbia, and any and all foreign countries, have one or more offices therein, and therein may hold, purchase, mortgage and convey real and personal property, except as and when forbidden by local laws.

The foregoing clauses shall be construed both as objects and powers, but no recitation, expression or declaration of specific or special powers or purposes herein enumerated shall be deemed to be exclusive; but it is hereby expressly declared that all other lawful powers not inconsistent therewith are hereby included.

IV. The corporation is authorized to issue capital stock to the extent of *one million* Dollars (\$1,000,000), divided into *ten thousand* shares of the par value of *one hundred* Dollars each.

V. The capital stock with which the corporation will commence business is subscribed by the incorporators as follows:

| Name. | No. of Shares. | Amount. |
|-------------------------------|--------------------|-----------------|
| <i>Seumas Casey</i> | <i>fifty</i> | <i>\$5,000</i> |
| <i>Henry Ross Lynch</i> | <i>twenty</i> | <i>\$2,000</i> |
| <i>B. Lucas Cody</i> | <i>twenty-five</i> | <i>\$2,500</i> |
| <i>Miles Cody</i> | <i>five</i> | <i>\$500</i> |
| | | <hr/> |
| | | <i>\$10,000</i> |

The post-office address of each of the incorporators is 417 Market Street, Camden, N. J.

VI. The corporation shall keep at its registered office in this State the transfer books, in which the transfers of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders and the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the inspection of a stockholder in person with respect to his interest as such stockholder, or for a purpose germane to his status as such, upon application in writing to the registered agent of the corporation in charge of such office and having the custody of said books; but the registered agent may refuse permission to any stockholder to examine the same (except as to the entries affecting the shares owned by such stockholder), unless and until satisfied that such examination and the information to be acquired thereby are for a legitimate purpose and not for a purpose hostile to the interest of the corporation or its individual stockholders and the determination of the registered agent shall be final, conclusive and binding upon all stockholders and all persons claiming under such stockholders.

VII. In furtherance and not in limitation of the powers conferred by statute, the Board of Directors are expressly authorized:

To hold their meetings, to have one or more offices, and to keep the books of the corporation within or, except as otherwise provided by statute, without the State of New Jersey, at such places as may from time to time be designated by them.

To determine from time to time whether, and, if allowed, under what conditions and regulations the accounts and books of the corporation shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted or limited accordingly, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the Board of Directors or by resolution of the stockholders.

To make, alter, amend and rescind the By-Laws of the corporation, to fix, determine from time to time and vary the amount to be reserved as working capital, to determine the time for the declaration and payment and the amount of each dividend on the stock, to determine and direct the use and disposition of any surplus or

net profits, and to authorize and cause to be executed mortgages and liens upon the real and personal property of the corporation, provided always that a majority of the whole Board concur therein.

Pursuant to the affirmative vote of the holders of a majority of the stock issued and outstanding, at a stockholders' meeting duly convened, to sell, assign, transfer or otherwise dispose of the property, including the franchises of the corporation as an entirety, provided always that a majority of the whole Board concur therein.

To appoint additional officers of the corporation, including one or more vice presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the By-Laws, the persons so appointed shall have and may exercise all the powers of the president, of the treasurer and of the secretary respectively, provided, however, that all vice presidents shall be chosen from the directors.

By a resolution passed by a majority vote of the whole Board, under suitable provision of the By-Laws, to designate two or more of their number to constitute an Executive Committee, which committee shall, for the time being, as provided in said resolution, or in the By-Laws, have and exercise any or all the powers of the Board of Directors, which may be lawfully delegated, in the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

The Board of Directors and the Executive Committee shall, except as otherwise provided by law, have power to act in the following manner, viz.: a resolution in writing, signed as affirmatively approved by all the members of the Board of Directors or by all the members of the Executive or other Committee, and thereafter with original or with duplicated signatures inserted in the recorded minutes and properly dated, shall be deemed to be action by such Board or such Committee, as the case may be, to the extent therein expressed, with the same force and effect as if the same had been duly passed by the same vote at a regularly convened meeting.

Subject to the foregoing provisions the By-Laws may prescribe the number of directors to constitute a quorum at their meetings, and such number may be less than a majority of the whole number.

The corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate in the manner now or hereafter prescribed by statute for the amendment of the certificate of incorporation.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this *seventh* day of *June*, 1910.

| | |
|------------------------------|---------|
| (Signed) <i>Seumas Casey</i> | (L. s.) |
| " <i>Henry Ross Lynch</i> | (L. s.) |
| " <i>B. Lucas Cody</i> | (L. s.) |
| " <i>Miles Cody</i> | (L. s.) |

WITNESS to the foregoing signatures

(Signed) *Francis X. Walsh*

STATE OF *Ohio* }
COUNTY OF *Huron* } ss.

BE IT REMEMBERED that on this *seventh* day of *June* A. D. One thousand nine hundred and *ten*, before the undersigned, personally appeared *Seumas Casey, Henry Ross Lynch and B. Lucas Cody*, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first made known to them, and each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

(Signed) *Francis X. Walsh,*

[*Commissioner's seal*] *Commissioner of Deeds for Ohio & New Jersey.*

REGISTERED in the office of the corporation at Camden, in the County of Camden, this _____ day of _____, 1910.

NEW JERSEY CORPORATION GUARANTEE & TRUST COMPANY,
REGISTERED AGENT.
Secretary.

RECEIVED in the Camden County, N. J., Clerk's Office
, 1910, and RECORDED in the Clerk's Record, No.
on page _____

Clerk.

ENDORSED:

"FILED and RECORDED

, 1910.

Secretary of State."

QUESTIONS

1. What is the minimum number of persons who may associate to form a corporation? State briefly the usual procedure in forming a company.
2. What is a charter?
3. Where must a charter usually be recorded?
4. Is it necessary to give notice to the public of the formation of a corporation? If so, how is this usually done?

CHAPTER IV

ORGANIZING UNDER THE CHARTER

33. The charter having been obtained, the incorporators are now ready to set the corporate machinery in motion. Ordinarily this is accomplished by arranging for a meeting of the incorporators and other stockholders to proceed with the organization of the company. In some states the organization meeting is held by the directors and there is no necessity for the stockholders to act in this matter.

34. The procedure of organizing a company will be treated under the following heads: (*a*) the place of holding the first meeting; (*b*) the time of holding the first meeting; (*c*) notice required of the time, place, and purposes of the meeting; (*d*) how the incorporators may attend the meeting and the business transacted thereat; (*e*) the payment of subscriptions to capital stock before commencing business.

(A) The place of holding the first meeting

35. In the absence of charter or statutory authority, the first and subsequent meetings of a corporation must usually be held within the limits of the state which chartered it. If the general statutory law of the state does not provide where the first meeting may be held, it must be held within the state.

36. In Delaware, Nevada, South Dakota, and West Virginia, however, statutes expressly provide that the first

meeting of stockholders may be held within or without the state. In Pennsylvania, if a majority of the incorporators, directors, or stockholders are citizens of another state, the corporation may be organized, and directors' and stockholders' meetings may be held at such place, within or without the state, as the majority shall from time to time appoint, except the annual election, which must always be held in Pennsylvania.

(B) The time of holding the first meeting

37. In many states the organization meeting must be held within a certain length of time after filing the articles of incorporation. Others provide that the first meeting shall be held within a certain length of time after the granting of the charter or the commencement of corporate existence. The statutes of still other states are silent on the question of when the organization meeting must be held, but in some of these states the question is answered to an extent by providing that the business of the corporation shall be commenced within a certain period under penalty of a forfeiture of the corporate franchises. In a few jurisdictions, no provision whatever is made concerning the time within which first meetings must be held or the corporate business begun.

38. The first meeting of the incorporators for the adoption of by-laws and the election of directors must be held within one month after filing articles of incorporation in Alaska, Idaho, the Philippine Islands, and South Dakota. In Porto Rico, the first meeting must be called within sixty days after filing articles. In California, Montana, North Dakota, and Oklahoma, the first meeting must be held within one month after incorporation. In West Virginia, the first meeting must be held within six months after the charter is granted. In Nebraska, the first meeting must be

held within one year after incorporation. In the District of Columbia and Kansas the organization meeting is held by the directors, who adopt the by-laws and elect officers. In New York, also, the first meeting of stockholders is sometimes entirely omitted.

39. The following states require a company's business to be commenced within a specified period: Alaska, California, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, West Virginia, and Wisconsin, all ONE YEAR; Connecticut, Delaware, Illinois, Iowa, Kentucky, Maine, Mississippi, Nevada, New York, North Carolina, Pennsylvania, Philippine Islands, Rhode Island, South Carolina, Utah, Virginia, all TWO YEARS; New Hampshire and Texas, THREE YEARS; Alabama, Arizona, and Wyoming, all FIVE YEARS.

(C) Notice required of the time, place, and purposes_of the meeting

40. All corporate meetings are invalid and the business transacted thereat is voidable, unless the notice required by the statute or governing instrument of the time, place, and purposes of such meetings has been given the corporate members. An exception is made in the case of stated meetings of which, as a rule, every member is presumed to have notice. The laws of the different jurisdictions vary widely regarding the notice required of the time, place, and purposes of the preliminary or organization meeting. In Arkansas, Maine, and New Hampshire, these matters are set forth in the certificate or agreement of incorporation. In other states where the mode of giving notice is prescribed by statute or charter, unless the requirements are strictly observed, the meeting will be void.

41. Generally, the statute determines who may call the original meeting. In some states, the meeting is assembled

by one or more of the incorporators designated for that purpose in the articles of incorporation. In other states, the notice must be signed by all the incorporators. In the great majority of states, written notice is required to be given the corporate members either by personal service, by publication, or by mail. The length of time varies from five to thirty days. Where the charter or governing statute does not prescribe the length of time in advance of the meeting when notice must be given, the law implies that the members shall have a reasonably long notice.

42. Generally speaking, the nature of the business to be transacted at any meeting should be stated. If the meeting is a stated or regular meeting at which any unusual business is to be transacted, ordinarily notice of this fact must be given. The statutes of almost all the states provide that notice of the time, place, and purposes of the preliminary or organization meeting may be waived by writing signed by all or a majority of the incorporators. A form of such waiver is shown on page 26.

(D) How the incorporators may attend the meeting and the business transacted thereat

43. Practically everywhere, it is lawful for the incorporators to attend the organization meeting either in person or by proxy. Sometimes all the incorporators live at a distance from the state where the company gets its charter. In many such cases, they all execute proxies and the organization meeting is conducted by the proxyholders according to a plan prearranged by the promoters and their attorneys. A form of proxy is shown in Section 237.

44. The main business ordinarily transacted at the organization meeting is the adoption of by-laws and the election of officers. See Section 48. In many cases, however, where subscriptions to capital stock are to be paid for in

WATERFORD GLUE COMPANY

We, the undersigned, being all the incorporators and all the subscribers to the stock and all the parties named in the certificate of organization of Waterford Glue Company, organized under the laws of the State of New Jersey, having its principal office at 217 Federal Street, Camden, New Jersey, hereby waive notice of the time, place, and purpose of the first meeting of stockholders of the said company, and fix the tenth day of October, 1910, at 11 o'clock in the forenoon as the time, and 217 Federal Street, Camden, N. J., as the place, of the first meeting of the incorporators and subscribers aforesaid. And we hereby waive all the requirements of the New Jersey statutes as to the notice of this meeting and the publication thereof; and we consent to the transaction of whatever business may come before the said meeting.

In witness whereof we have hereunto signed our names this first day of October, A.D. 1910.

(Signed) WILFRID BARTON

" HENRY CRANE

" PETER J. LLOYD

" WALTER DUGAN

property or services, a resolution is passed authorizing the directors to accept such property or services in payment of subscriptions to capital stock, and an appraisalment of the value thereof is arranged for in the method provided by statute.

(E) The payment of subscriptions to capital stock before commencing business

45. The payment, or even the subscription, of a certain percentage of the capital stock, is not essential to corporate existence unless made so by statute. Alabama requires that

twenty-five per cent of the capital stock or \$1,000 be subscribed before business may be commenced; Connecticut, Delaware, Nevada, and New Jersey likewise require subscriptions amounting to \$1,000; Louisiana requires subscriptions of \$3,000. In North Dakota, Pennsylvania, and Utah, ten per cent of the authorized capital must be subscribed; in the Philippine Islands, twenty per cent is required; in Kentucky, Michigan, Oregon, South Carolina, and Wisconsin, fifty per cent; while in the District of Columbia, Illinois, Missouri, Texas, and Washington the entire authorized capital must be subscribed.

46. The requirement that a certain part of the capital shall be paid in at once is made in the following states: New Jersey, where ten per cent or \$1,000 is required; Alabama, where twenty-five per cent or \$1,000 is required; New York, where \$500 is required; Connecticut, Michigan, and Porto Rico, where \$1,000 is required; New Mexico, where \$2,000 is required; the Philippine Islands, where five per cent is required; Florida, Georgia, Ohio, Pennsylvania, Utah, and West Virginia, where ten per cent is required; Kansas, South Carolina and Wisconsin, where twenty per cent is required; Vermont, where twenty-five per cent is required; Missouri and Texas, where fifty per cent is required; and the District of Columbia and Illinois, where the whole capital stock must be paid in before the corporation can commence business.

QUESTIONS

1. Where must the meeting for organization under the charter be held according to the law of your state?
2. How soon after the granting of a charter must this meeting be held in your state? When must business be commenced?
3. Is it necessary to give notice of corporate meetings? To whom must notice be given? What is the effect of not giving notice?
4. Who makes the call for the first meeting?

5. How may a meeting be validly conducted without the giving of prior notice?

6. May incorporators attend a meeting by proxy? May they vote by proxy?

7. What is the business usually transacted at the first meeting?

8. In your state, how much of the capital stock must be subscribed, and how much must be paid in, before the company may begin business?

CHAPTER V

THE BY-LAWS

47. A corporation may enact a set of formal regulations for conducting its business systematically. See Section 72. These regulations are usually called the by-laws.

(A) Adopting and amending by-laws

48. Ordinarily, only the stockholders have power to adopt by-laws, and this power is in most cases exercised at the first stockholders' meeting after the charter has been granted. See Section 44. A set of by-laws is usually prepared beforehand for submission to the stockholders, who should vote thereon. They ought to take up each clause of the by-laws separately, in order that its merits and demerits may be weighed. If the by-laws, as recommended by those who have drawn them up, are swallowed entire by the stockholders, without special consideration of each clause, defects may pass unnoticed. These defects will, perhaps, cause trouble later at a time when it may be awkward to remedy them.

49. In the following states the directors have power to frame a set of by-laws for their corporation: Connecticut, Illinois, Kansas, Kentucky, Nebraska (as to manufacturing companies), Ohio and Utah; also the District of Columbia. Some power in this matter is given to directors of New York companies, but for certain reasons it is not usually

exercised. Under Minnesota laws the first board of directors should adopt by-laws, which remain effective until amended by the stockholders. In most of these states where the board is ordinarily given power concerning the by-laws, the regulations of a particular corporation may reserve that power to the stockholders; just as in the majority of states, where the stockholders ordinarily have sole power over the by-laws, the regulations of a given corporation may transfer that power to the directors.

50. Usually the power to amend by-laws is vested in the stockholders. But the directors of companies chartered by the states named in Section 49 (except Minnesota and New York) ordinarily enjoy this power. Most sets of by-laws provide for this matter and determine the procedure to be followed in procuring amendments. See Section 56.

51. The by-laws should be carefully recorded in the minute book wherein are set forth the proceedings of the meeting at which they have been adopted. Likewise, any addition to or amendment of the by-laws should be duly noted on the corporate records. Besides, many companies have copies of the by-laws printed for their officials and others, with blank pages interleaved so that any change may be conveniently entered.

(B) What the by-laws may properly contain

52. A typical set of by-laws is given in Section 56. It shows the various matters for which these domestic regulations of a company generally provide. Of course each corporation is free to depart from the customary form of by-laws to suit its own convenience, so long as it keeps within the bounds defined below.

53. The by-laws of a corporation must be consistent with the Constitution and statute law both of the United States and of the state which granted the corporation its

charter. The by-laws must be consistent also with the company's charter.

WELLS v. BLACK et al., 117 Cal. 157 (1897). Wells, a depositor in the insolvent Savings Bank of San Diego, sued Black and others to enforce their constitutional and statutory liability as stockholders of the bank. The defendants asserted that by the terms of the by-laws the stockholders were not to be subject to such liability. *Held*, the by-laws had no binding force upon the depositors. Wells was allowed to recover.

TROWBRIDGE v. HAMILTON, 18 Wash. 686 (1898). Hamilton, a stockholder in a building association, gave a note and mortgage to the association. They were assigned to Trowbridge, who sued to foreclose the mortgage. Hamilton denied the validity of the assignment because a statute required building associations to deposit all mortgage securities with the state auditor. *Held* that as the claim against Hamilton was non-assignable by statute, his rights in this regard could not be impaired by the enactment of corporate by-laws allowing such assignment.

STATE ex rel. COREY v. CURTIS, 9 Nev. 325 (1874). The statute under which the Ophir Silver Mining Company was organized required a majority of the trustees to do a corporate act. A vacancy having occurred in the board, three of the trustees, including the president, voted to elect W. S. Lyle. The other three voted for a rival candidate. As the by-laws provided that the president should have the casting vote at all trustees' meetings, he claimed the right to vote again for Lyle, and declared Lyle duly elected as trustee. Then Lyle and his three supporters, against the protests of the other three, appointed Corey superintendent. Corey sued to remove Curtis, the old superintendent. Curtis contended that Corey had not been duly appointed, because Lyle had not been properly elected. *Held*, the by-laws could not be permitted to override the statute requiring a majority of the trustees to act. Lyle therefore had not been duly elected, and the appointment of Corey was consequently void.

ANDREWS et al. v. UNION MUTUAL FIRE INS. Co., 37 Me. 256 (1854). The insurance company's charter authorized it to insure

property against loss by fire. A by-law stated that the company would be liable for losses to property damaged by lightning. The trustees of a certain church procured from the company a policy of insurance on its meeting-house. The meeting-house was struck by lightning and greatly shattered, although not set on fire. The trustees brought suit on the policy. *Held*, as no by-law of the insurance company could enlarge its corporate powers, the plaintiffs could not recover for loss by lightning.

54. By-laws should be of general application. The power to make rules for governing a company must not be abused so as to favor some stockholders at the expense of the others, or to put on some a burden from which others are exempt.

BUDD v. MULTONOMAH STREET RAILWAY Co., 15 Ore. 413 (1887). A statute authorized corporations to make by-laws for the sale of unpaid assessments due on stock. Budd was a stockholder in the railway company, on whose stock the directors levied an assessment. Soon afterwards a resolution was passed declaring Budd delinquent and ordering a sale of his stock. Budd contended the sale was illegal. *Held* that the resolution could not be considered a valid by-law because it was directed solely against the interests of a particular stockholder. Hence, the sale was void.

55. By-laws cannot be passed so as to impair the vested rights of stockholders and others. The principle of majority rule which obtains in most corporations will not be stretched to permit a violation of the fundamental contract of membership, or injustice to outsiders.

PEOPLE ex rel. BOSQUI v. CROCKETT, 9 Cal. 112 (1858). Palmer owned stock in the Sacramento Valley Railroad Company to which he had given his note. He transferred his stock to Bosqui. Two days later the directors passed a by-law providing that no stock would be transferred upon the company's books until all the assignor's indebtedness should be liquidated. Bosqui requested that a transfer be made to him, which was refused by the company except upon

the condition that he pay off Palmer's note. Bosqui sued to compel the transfer. *Held*, the by-law did not give the company the lien it claimed or a right to refuse to enter the transfer.

TRUSTEES OF FREE SCHOOLS IN ANDOVER v. FLINT, 13 Metc. (Mass.) 539 (1847). The school trustees sued Flint to recover money lent to the Andover Mechanic Association. They alleged that Flint was a stockholder of the association and that a by-law made its members individually liable for its debts. *Held* that it was not competent for the corporation, whose charter imposed no individual liability upon its members, to render Flint liable by force of a by-law to which he did not consent.

56. The following is a set of by-laws which embodies most of the clauses usually found in such regulations.

BY - LAWS

ARTICLE I.—STOCKHOLDERS

1. Annual Meetings.

A meeting of the stockholders shall be held annually at the office of the corporation in _____ at _____ o'clock _____ m., on the _____ in _____ of each year for the purpose of electing directors and for the transaction of such other business as may properly come before the meeting. The directors may designate some other place at which the annual meeting shall be held, but the call and notice of such meeting shall clearly show such change.

2. Notice.

A written or printed notice of such meeting shall be mailed to each stockholder at the address appearing on the records of the company at least fifteen days prior to the time of such meeting.

3. Organization.

The president, and in his absence, the vice president, and in the absence of both, any stockholder or proxy for a

stockholder, may call meetings of stockholders to order, but a chairman chosen by the stockholders present shall act as chairman thereof. The secretary of the corporation shall act as secretary of all meetings of the stockholders. In his absence, the presiding officer may appoint any person to act as secretary, but the person so acting shall make affidavit that the record of such meeting as compiled by him is true and complete.

4. Quorum.

A majority of the stock, issued and outstanding, represented in person or by proxy, shall constitute a quorum at all meetings of stockholders.

5. Adjournment.

If at any annual or special meeting a quorum fails to attend in person or by proxy, a majority in interest of the stockholders represented at such meeting may, after the lapse of an hour, adjourn the meeting from time to time, without further notice, until a quorum does attend, and thereupon any business may be transacted that might have been transacted at the meeting as originally called had the same been held.

6. Special Annual Meetings.

Whenever from any cause an annual meeting of stockholders is not held on the day provided, a special annual meeting may be called by the directors in the manner prescribed for the holding of annual meetings of stockholders, or by the holders of ten per cent of the outstanding stock, at which special annual meeting, directors may be elected and any other business transacted that might have been transacted at the annual meeting had the same been held.

7. Voting.

At all meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock owned by him and represented at such meeting in person or by proxy. Voting may be *viva voce* or by uplifted hand, but upon

demand of any stockholder present or proxy for a stockholder, all voting shall be by ballot. The votes for directors shall be accumulative. All proxies shall be in writing, duly signed and witnessed, and may be made to and voted by persons other than stockholders of the corporation, but no proxy shall be valid if made more than two months prior to the time of the meeting at which it is attempted to be used.

8. Special Meetings.

Special meetings of the stockholders for any purpose may be held whenever called by the board of directors, either by written instrument signed by a majority or by the vote of a majority, and shall be called whenever stockholders owning ten per cent of the capital stock issued and outstanding make application therefor in writing to the president or secretary, stating the object of such meeting; provided, that ten per cent in interest of the stockholders may give notice of such meeting if the officers of the company fail or refuse to act.

9. Notice of Special Meetings.

Notice of each special meeting of stockholders, stating the time, place and purpose thereof, shall be mailed to stockholders at least ten days prior to such meeting, and in the same manner prescribed for giving notice of annual meetings.

10. Order of Business.

The stockholders may determine the order of business at their meetings.

11. List of Stockholders.

At each meeting of stockholders, the stock records of the corporation, or a full, true and correct list of all the stockholders entitled to vote at such meeting, with the number of shares held by each, certified to by the secretary, shall be furnished by the secretary for use at the meeting.

12. Tellers.

At meetings of stockholders, all proxies shall be received and taken in charge and all questions touching the qualifica-

tions of voters and validity of proxies, shall be decided, and all ballots shall be received and counted by *three* tellers, who shall be appointed by the presiding officer of the meeting by and with the consent of a majority of the stock represented, and who shall certify to the returns.

13. Waiver of Notice.

Any stockholder or director may, in writing, waive any notice required by these by-laws to be given him.

ARTICLE II.—BOARD OF DIRECTORS

1. Number and Qualifications.

The business affairs of the corporation shall be controlled by a board of directors consisting of *seven* stockholders of the corporation, who shall be elected by the stockholders at their annual meeting.

2. Term.

Each director shall qualify by filing a written acceptance with the secretary of the corporation, and shall serve during the term for which he was elected and until his successor has been elected and qualifies, provided he remains a stockholder of the corporation during such time, but he shall cease to be a director whenever he ceases to be a stockholder, and such vacancy shall be filled by the directors remaining in office in the manner hereinafter prescribed.

3. Annual Meeting.

As soon as practicable after each annual meeting or special meeting at which directors are elected, the newly elected board of directors shall meet for the election of officers and the transaction of other necessary business.

4. Regular Meetings.

Regular meetings of the board of directors shall be held at _____ o'clock _____ m. on the _____ of the _____ months of _____ of each year, if not a legal holiday,

and if a legal holiday, then on the next succeeding business day. No notice shall be given of regular meetings.

5. Special Meetings.

Special meetings of the board of directors shall be held whenever called by the president or secretary of the corporation, or by one-third of the directors. Only such business as is specified in the notice thereof may be transacted at special meetings.

6. Notice.

The secretary shall give notice to each director of each meeting of the board, where notice is required, by mailing the same at least five days before the time of such meeting, or by telegraphing or telephoning not less than two days prior to the time of meeting.

7. Place of Meeting.

The directors may hold their meetings, have an office and keep the books of the corporation in_____

and at such other places as they may from time to time designate.

8. Quorum.

A majority of the board of directors shall constitute a quorum for the transaction of business, but a majority of those present at the time and place of any meeting of directors regularly called, although less than a quorum, may adjourn from time to time, without notice, until a quorum attends. The vote of a majority of the directors present at any meeting qualified to transact business in favor of or against any proposition shall prevail, except as herein otherwise provided.

9. Order of Business.

The board of directors may from time to time determine the order of business at their meetings.

10. Chairman.

At all meetings of the board of directors, the president, or in his absence, the vice president, or in the absence of

both, a chairman chosen by the directors present, shall call the meeting to order and preside over the same.

11. Vacancies.

In case of any vacancy in the board of directors from death, resignation, disqualification or other cause, the remaining directors, if constituting a majority, may elect a successor to hold office for the unexpired term of the director whose place becomes vacant and until the election and qualification of a successor, provided, however, that in the case of the death, resignation, or disqualification of the entire board of directors, a new board of directors shall be elected for the unexpired term at a special meeting of the stockholders called for that purpose by any officer of the corporation or by stockholders owning ten per cent of the capital stock outstanding. All resignations of directors shall be in writing addressed to the board of directors and shall not be effective until the same have been accepted by the board of directors, or the stockholders in cases where the entire board resigns.

12. Compensation.

The directors and officers of the corporation and all members of committees shall serve without salary, except as may be determined from time to time by the vote of a majority of all the directors.

13. General Powers of Directors.

In addition to the powers already conferred upon them, and except as otherwise provided by law, the board of directors are vested with the following powers:

(a) To purchase, lease or otherwise acquire, in the name of the corporation any and all real estate, personal property, rights and privileges deemed necessary or convenient for the carrying on of its business, for such consideration and on such terms and conditions as the said directors may determine, and in their discretion may pay therefor, in whole or in part, with funds of the corporation, or stock, bonds, debentures or other securities owned or issued by it.

(b). To mortgage or otherwise hypothecate or dispose of any real estate or personal property, rights or privileges belonging to the corporation or leased to or otherwise held by it, whenever in their opinion the interests of the corporation will be promoted thereby.

(c) To create, issue and make mortgages, bonds, deeds of trust, trust agreements, and negotiable and transferable instruments and securities.

(d) To appoint any person or corporation to accept and hold in trust for this corporation any property, real, personal or mixed, belonging to this corporation or in which it is interested, or for any other purpose to act for the corporation.

(e) To delegate the powers and assign the duties of any officer to any other officer, or to any director, or any person, when by reason of absence or other cause the directors deem such action requisite.

(f) To declare the capital stock of the corporation forever non-assessable, and to prescribe such rules and regulations with regard to transfers of stock and the issue thereof as may seem necessary, but not inconsistent with the Articles of Incorporation, the law or these By-Laws.

14. Removal of Officers.

Any director or officer may be removed from office for fraud or other misconduct in office by the majority vote of the whole board at any regular or special meeting, or by resolution signed by a majority of the whole board, or in like manner any officer or director may be suspended while an investigation is being made, but no such removal shall take place except on proper showing.

15. Executive Committee.

The board of directors may, in accordance with the Articles of Incorporation, appoint an executive committee and vest it with the powers and duties of the board of directors while not in session, and may allow the members

of the committee such compensation and dispense with their services at such time as the board shall deem proper.

16. Additional Regulations.

The directors may adopt such additional rules and regulations for the management of the affairs of the corporation as the conduct of its business may require, but such regulations shall not be inconsistent with these By-Laws, the Articles of Incorporation or the law. Such regulations so adopted may be repealed or amended by the stockholders at any regular or special meeting thereof.

ARTICLE III. OFFICERS

1. Executive.

The executive officers of the corporation shall be a president, one or more vice presidents as the directors may determine, a secretary and a treasurer, who shall be elected annually by the board of directors, but by the vote of a majority of the directors. Any offices, except those of president and secretary, may be left unfilled for such period as may be fixed by resolution. The secretary and treasurer may or may not be directors. The powers and duties of treasurer may be exercised and performed by any of the other officers.

2. Oath and Bond.

Each officer and agent shall take an oath to discharge his duties faithfully, and the board of directors may require any or all of the officers and agents to give bond in such sum as the board may prescribe.

3. Subordinates.

The board of directors may appoint such other officers and agents as they may deem necessary, who shall perform such duties as from time to time may be prescribed by the board of directors, but power to appoint and remove such officers and agents may be delegated by the board to the president of the corporation.

4. Tenure of Office.

All officers and agents shall be subject to removal at any time, with or without cause, by the affirmative vote of a majority of the whole board.

5. President, Powers and Duties.

The president shall be the chief executive officer of the corporation. He shall call to order all meetings of the stockholders, and shall preside at all meetings of the board of directors. Subject to the control of the board of directors and the executive committee, he shall have general charge of the business of the corporation; he shall sign all authorized bonds, contracts or other securities or obligations in the name of the corporation. He shall perform such other duties as may from time to time be assigned to him by the board.

6. Vice President.

In case of the absence or disability of the president, the duties of the office shall be performed by the vice president, but the board of directors may assign to him, or them, as the case may be, such other duties as they may from time to time deem necessary.

7. Treasurer.

The treasurer shall have the custody of all the funds and securities of the corporation which may come into his hands; when necessary or proper, he shall endorse on behalf of the corporation for collection, checks, notes and other obligations, and shall deposit the same to the credit of the corporation in such bank or banks as the board of directors may designate; he shall sign receipts and vouchers for payments made to the corporation; he shall sign checks made by the corporation and pay out and dispose of the same under the direction of the board of directors; he shall sign with the president, or such other person or persons as may be designated by the board of directors, all authorized promissory notes and bills of exchange, bonds and other securities of the corporation; whenever required by the board, he shall render a statement of his cash accounts; he

shall enter regularly in the books of the corporation to be kept for that purpose, full and accurate accounts of all moneys received and paid by him on account of the corporation; he shall perform all duties incident to the position of treasurer, subject to the control of the board, and such other duties as may be imposed upon him by the board of directors.

8. Secretary.

The secretary shall keep the minutes of all meetings of the board of directors, and of the stockholders; he shall attend to the giving and serving of all notices for the corporation; he shall sign with the president or other officer or officers designated by the board of directors all authorized contracts, and shall affix the seal of the corporation thereto; he shall have charge of the certificate and stock books and records of the corporation, and such other books and papers as the board of directors may direct; and shall perform all duties incident to the office of secretary, subject to the control of the board, and such other duties as may from time to time be imposed upon him by the board of directors.

9. Voting upon Stocks.

Unless otherwise ordered by the board of directors, the president shall have full power and authority on behalf of the corporation to attend and to act and to vote at any meetings of the stockholders of any corporation in which the corporation may hold stock, and at any such meeting shall possess and may exercise any and all the rights and powers incident to the ownership of such stock and which, as the owner thereof, the corporation might have possessed and exercised if present, but neither the president nor any other officer nor the board of directors shall have the right to vote any of the stock of this corporation owned by it. The board of directors by resolution, from time to time, may confer like powers upon any person or persons.

ARTICLE IV.—CAPITAL STOCK**1. Certificates.**

The certificates for shares of the capital stock of the corporation shall be in such form as may be approved by the board of directors. The certificates shall be signed by the president or vice president and the secretary or an assistant secretary and shall be impressed with the seal of the corporation. No certificates of stock shall be valid unless so signed and sealed.

2. Numbered and Recorded.

All certificates of stock shall be consecutively numbered, and the numbers, the names of the owners, the number of shares and the date of issue shall be entered on the books of the corporation.

3. Certificates Canceled.

Except in cases where certificates are lost or destroyed, and in such cases only after the receipt of satisfactory bond, unless the giving of a bond be waived by the board of directors, no new certificate shall be issued until the former certificate for the same number of shares of the same class shall have been surrendered and canceled.

4. Transfer.

Shares in the capital stock of the corporation shall be transferred only on the books of the corporation by the holder thereof in person or by his attorney upon the surrender and cancellation of certificates for a like number of shares.

5. Forfeiture of Shares.

Any subscriber for stock in this corporation who fails for two months after it is due to pay any installment thereon levied by the board of directors, or the subscription price of such stock when called for by any officer of the corporation by direction of the board of directors, shall be served with a written or printed notice by the secretary, which notice shall state the amount due from such delinquent subscriber

or stockholder, and shall notify him that unless he pays the same within fifteen days from the date of mailing such notice by the secretary, the shares subscribed for by him and delinquent on the books of the corporation, as set out in said notice, shall be forfeited and sold according to law. If such subscriber or stockholder shall fail to pay, within the time specified in such notice, the entire amount due on such delinquent shares, the same shall be advertised for sale by the publication of notice thereof in some newspaper of the county where the Articles of Incorporation are filed, at least once a week for four consecutive weeks prior to the time of such sale. A similar notice of such sale of delinquent shares shall be deposited in the post office, postage prepaid, and directed to the delinquent stockholders or subscribers at their addresses as the same appear on the books of the corporation, and the secretary or other person designated by the board of directors to give such notice by mailing the same, shall make affidavit of the mailing of such notices according to the foregoing regulations.

The sale of all delinquent shares of capital stock of this corporation shall be by auction to the highest bidder, and the corporation, through any officer thereof or any agent appointed by the board of directors, may purchase such shares of stock for its benefit; provided, that any subscriber or stockholder shall have the right to redeem such shares prior to the time of the sale thereof by the payment to the corporation of the installment due thereon, plus the pro rata cost of advertising such sale or other expense incurred in connection therewith; provided further, that no subscriber for stock or stockholder shall have the right to acquire at any sale any shares, on which he is delinquent in the payment of installments levied by the board of directors, at a less price than the installment delinquent thereon, plus the proportion of the expense of such sale applicable to such shares.

All sales of shares of delinquent stock shall be held at the principal office of the corporation as stated in the Articles of Incorporation.

The amount realized from the sale of any delinquent shares of stock, in excess of the amount due on the subscription or call, with interest at six per cent per annum from the time the same became due, and the expense of the notice and sale, shall be paid to the stockholders whose shares were forfeited and sold.

6. Regulations.

The board of directors may make such further rules and regulations concerning the issue, transfer, registration of certificates and sale of delinquent shares of the capital stock of the corporation as may be deemed expedient, and not inconsistent with the law, the Articles of Incorporation and these By-Laws, and may regulate the closing of the transfer books prior to the time of any stockholders' meeting or the payment of any dividend, but the notice of any meeting of stockholders or the notice of any dividend, when any such regulations have been made, shall specify the time of the closing of the transfer books.

7. Dividends.

The board of directors may from time to time declare dividends upon the capital stock from the surplus or net profits of the corporation over and above the amount which, from time to time, may be fixed as a reserve for working capital.

ARTICLE V.—SEAL

The board of directors shall provide a suitable seal, containing the name of the corporation, the year of its creation, and the words _____, which seal shall be in the charge of the secretary to be used as directed by the board.

ARTICLE VI.—AMENDMENTS TO BY-LAWS

The board of directors shall have power to alter and amend these By-Laws, by the vote of a majority of all the directors at any regular meeting of the board of directors,

or at any duly called special meeting thereof, but notice of intention to amend shall be given all of the directors at least thirty days prior to the time of the meeting at which the amendments will be considered.

(C) Who are bound to know the by-laws

57. Officials and directors of a company are expected to know its by-laws. See Section 145. Likewise, the subordinate employees, so far as the by-laws affect their powers, duties, and liabilities. Likewise, the stockholders. In order to avoid disputes, a few companies get their stockholders to sign an approval of the by-laws, but this precaution need seldom be taken.

DARRAH v. WHEELING ICE & STORAGE Co., 50 W. Va. 417 (1901). A by-law of the ice and storage company empowered the board of directors to elect officers and continue them in office at the board's pleasure. Darrah served as secretary and treasurer for four months, when he was removed from office. He sued the company, claiming the salary for the rest of the year. *Held* that the officer of a corporation is presumed to know its by-laws adopted before his appointment, and is bound by them as to his tenure of office.

HUNTER v. SUN MUTUAL INSURANCE COMPANY OF NEW ORLEANS, 26 La. Ann. 13 (1874). Hunter was employed for a year by the insurance company as premium bookkeeper. He was reëngaged for a second year and had served two months when he was dismissed. He sued to get his salary for the balance of the year. The company contended that its by-laws provided that officers should hold office only during the pleasure of the majority of the directors. *Held*, as Hunter was an officer in the sense of the by-laws and must be presumed to have known them, he could not recover.

CUMMINGS v. WEBSTER, 43 Me. 192 (1857). The by-laws of the Hamilton Mutual Insurance Company declared that all policies not settled for within thirty days would become void, and that agents were not authorized to bind the company. David Boyd made application through Webster, an agent of the company, for the renewal of a policy insuring his stock. Boyd neglected to pay the

premium to Webster, relying upon Webster's statement that the policy was all right. The stock was destroyed by fire. Later Boyd offered Webster the premium, and demanded the policy. Webster said the policy had expired because of Boyd's failure to pay the premium within thirty days. Boyd's administrator, Cummings, sued Webster for conversion of the policy. *Held* that the by-laws were binding on all members of the company and that the policy had expired. As Boyd, a member of the mutual insurance company, was expected to know the by-laws, Webster could not be held responsible for what he had said.

58. An outsider who deals with a corporation through one of its officials or other agents is bound to learn the extent of that agent's authority. If such authority is defined in the by-laws, and the agent has overstepped his powers, the outsider cannot usually hold the company liable.

59. But sometimes even the by-laws may be waived if the company has for a long time acted in disregard of them, or knowingly permitted one of its agents to do so, and if the false appearances thereby created have misled the other party. This is on the well-known principle of estoppel.

MOYER v. EAST SHORE TERMINAL CO., 41 S.C. 300 (1893). A by-law of the terminal company provided that no officer of the company, except the board of directors, should be authorized to make contracts of service for the period of a year. The general manager employed Moyer as agent by the year. The company refused to allow Moyer to continue his duties for a year, and he sued to recover the balance alleged to be due him. The company claimed that the general manager lacked authority to employ Moyer. *Held* that Moyer, a stranger, was not bound to inquire into the by-laws to ascertain whether the officer with whom he was dealing had authority to act. The general manager apparently had power to make the contract in question, and the company was bound.

BUCK v. TROY AQUEDUCT CO., 76 Vt. 75 (1903). The by-laws of the aqueduct company provided for five directors. But a board

of only three directors conducted the concern's business for a long series of years, and during that period executed a promissory note which became Buck's property. Buck sued the company on this note. The company denied its validity, because the by-laws had not been complied with. *Held*, Buck could recover. The requirement that there be five directors had been waived.

BANK OF HOLLY SPRINGS v. PINSON, 58 Miss. 421 (1880). Pinson sued the bank to recover damages for the bank's refusal to transfer on its books certain stock certificates which had been assigned to Pinson by one Crump. The bank defended on the ground that Crump was indebted to it, and that, under a by-law of the corporation, it had a lien upon the stock. Pinson proved that it had been the bank's uniform course to issue certificates of stock which did not contain the notice required by the by-law providing for the lien on the stock. *Held*, such uniform conduct must be deemed, as to all non-members of the corporation, a waiver of the by-law providing for the lien. Pinson won.

60. Again, a company may choose to ratify what an agent has done in excess of his powers. After affirming an unauthorized act, the company is no longer free to dispute its validity.

BLAIR v. METROPOLITAN SAVINGS BANK, 27 Wash. 192 (1902). A by-law of the bank provided that no transfer of mortgages or other securities should be made except by vote of the board of directors. Without consulting the board, the secretary made a loan beyond the company's charter power and sold Blair the note and mortgage obtained from the borrower, guaranteeing the payment thereof in the bank's name. The charter was amended so as to legalize such transactions, and the directors made provision to meet the bank's alleged liability by entering into a new agreement with Blair. Blair sued to recover on the guaranty of the note and mortgage. The bank denied liability on the ground that the secretary had altogether lacked authority to bind it. *Held*, the bank was bound through its ratification of what had been done.

UNDERHILL v. SANTA BARBARA LAND, BUILDING AND IMPROVEMENT Co., 92 Cal. 300 (1892). The defendant company purchased

lumber from Gorham & Company and executed two mortgages to secure the indebtedness. They were assigned to Underhill, who sued to foreclose them. The defendant company contended that the mortgages were void because given in violation of a by-law, which provided that no indebtedness should be incurred by the directors in excess of the capital stock actually subscribed at the time. It was proved that, although no formal resolution ratifying the directors' action in authorizing the mortgage had been passed by the stockholders, yet the indebtedness had been talked over at a stockholders' meeting without objection to the directors' action. *Held*, as the stockholders had not objected to the directors' action after being fully informed of it, the company was liable.

QUESTIONS

1. What are by-laws? By whom are they enacted?
2. In your state have the directors of a company power to change its by-laws?
3. The laws of Pennsylvania provide that stockholders shall be liable for six months for all personal services and labor for which certain Pennsylvania corporations may become liable. On the insolvency of the Pennsylvania Soap Company, Ralston, a clerk of the company, sued Johnson, a stockholder, to recover for his services. Johnson pleaded in defense a by-law which relieved the stockholders of this statutory liability. Is his defense good?
4. May a corporation pass a by-law relating to a certain stock certificate or to dealings with a certain stockholder?
5. The by-laws of the Atlanta Trust Company provided that any note clerk neglecting to protest a note in consequence whereof the indorsers would cease to be liable on it, should forfeit the amount of any such note from his salary, in case the bank should be obliged to pay the note. Walker, a note clerk, forgot to protest a note for \$100 and the company deducted \$100 from his salary. Walker sued the Atlanta Trust Company for \$100. Can he recover?
6. Is an outsider ever bound by the by-laws?
7. May the directors of a company waive a by-law?
8. Is it possible for a company to ratify an act of its agent done outside of his authority as limited in the by-laws?

PART TWO .

POWERS OF CORPORATIONS

CHAPTER VI

THE EXTENT OF CORPORATE POWERS

61. The charter of a corporation is the measure of its powers. Therefore a corporation has only such powers as are conferred upon it by its charter. Powers may be so conferred upon a corporation, (1) expressly by being enumerated in the charter, or (2) impliedly because they are incident to corporate existence or because they are necessary or proper for the exercise of the powers expressly conferred. A corporation, being a mere creature of law, possesses only those properties which its charter confers upon it, either expressly or as incident to its existence and operation.

62. The powers which are expressly conferred upon corporations largely depend upon the statutes of the jurisdiction in which they are created. But independently of the grant of express powers, it may be said that corporations possess those powers which are described as their "common law" powers, namely: (1) To make by-laws and other regulations for their own government; (2) to have a corporate seal by which to express their assent to contracts and to authenticate other documents executed by them; (3) to sue and be sued in the courts of justice; (4) to make contracts in furtherance of the objects for which they are created. In addition to these powers, which are usually implied even in the absence of an express grant, most corporation laws confer also (1) the power of continuous or

perpetual succession, and (2) the power to acquire and hold real and personal property.

63. The usual powers of corporations, express and implied, will be grouped together and treated generally under the following heads: (A) Continuous or perpetual succession; (B) corporate name; (C) corporate or common seal; (D) power to make by-laws; (E) general contractual powers and liabilities; (F) acquisition, alienation and encumbrance of personal and real property; (G) power to borrow money; (H) powers and liabilities with respect to negotiable instruments; (I) certain miscellaneous powers.

(A) Continuous or perpetual succession

64. The power of perpetual or continuous succession is found in virtually all corporations. It is frequently said that "a corporation never dies." This means that a corporation is generally endowed by law with the faculty of existing forever, unless its charter or the state law, as is often the case, fixes a period for the duration of corporate existence.

FAIRCHILD v. MASONIC HALL ASSOCIATION AND HUNT, STOCKHOLDER, 71 Mo. 526 (1880). Hunt owned 400 shares in the Masonic Hall Association, a corporation invested by its charter with "perpetual succession." Fairchild obtained a judgment against the association, but it had no property out of which he could collect. He then sued Hunt in an attempt to enforce the stockholders' double liability imposed by statute. Hunt defended on the ground that although the charter contained the words "perpetual succession," it was limited by the general statute which confined the duration of all corporations, where there was no limit in the charter, to twenty years. As this suit was brought after the expiration of twenty years Hunt contended that the judgment was void, and that execution against a stockholder could not issue on a void judgment. *Held*, the words, "perpetual succession," in their natural and ordinary acceptance, signify indefinite duration and not merely continuous or uninter-

rupted succession for a limited time. As in this instance they were unrestricted by other terms, the ordinary meaning must be taken and the corporation be held invested with the right to exist forever. Hunt lost.

65. The maximum periods fixed for the duration of corporate existence in the various states are as follows: twenty years, Colorado, Georgia, Iowa, and North Dakota; twenty-five years, Arizona and South Dakota; thirty years, Michigan and Minnesota; forty years, Montana; fifty years, Alaska, California, Idaho, Indiana, Kansas, Mississippi, Missouri, New Mexico, Philippine Islands, Texas, Washington, West Virginia, and Wyoming; sixty years, North Carolina; ninety-nine years, Illinois and Louisiana; 100 years, Utah; perpetual, Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Kentucky, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Porto Rico, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin.

(B) Corporate name

66. A corporate name is not only incidental, but necessary to the very existence of a corporation. Without a name, a corporation could not readily act; it could not sue or be sued, contract, receive or grant, or properly perform any of its corporate functions. However, it is not necessary that the corporate name should be stated in the charter. A corporate name may be acquired by usage and reputation merely.

SMITH *v.* TALLASSEE BRANCH OF CENTRAL PLANK ROAD Co., 30 Ala. 650 (1857). The act of 1854 incorporated the Central Plank Road Company and provided: "Any individual, or association, may establish branch plank roads,—governed by the respective stockholders thereof; and said stockholders for building branches to

said central plank road may become, and hereby are, incorporated under the provisions of this act." In a suit against Smith by the Tallassee branch to recover stock assessments, *held*, although a name is necessary to the existence of a corporation and is generally expressed in the charter, it may nevertheless be acquired by usage and reputation. The Tallassee branch had been so known and designated since its commencement and had acquired this corporate name by usage and reputation.

67. Usually, the incorporators may designate their company by any name they choose. Sometimes, however, state statutes provide that the name adopted must contain one of the words "association," "company," "corporation," "club," "incorporated," "society," "union," or "syndicate" to designate it as a corporation and that it shall be such as to distinguish it from any other corporation chartered by the state or engaged in the same business or promoting or carrying on the same objects or purposes in the state. Sometimes the use of a certain word as part of a corporate name is forbidden.

BRADLEY FERTILIZER Co., 19 Pa. Co. Ct. 271 (1897). The "Bradley Fertilizer Company of Philadelphia" applied to the Secretary of the Commonwealth of Pennsylvania for a charter. A protest was lodged by the Bradley Fertilizer Company, a Massachusetts corporation which had registered and was doing business in Pennsylvania, objecting to the incorporation of the new concern on the ground of similarity of names. *Held*, the application could not be granted. The names were so similar that the granting of a charter under the proposed name would lead to confusion in the imposition and collection of the taxes due the Commonwealth, as well as in the delivery of letters and telegrams, etc.

(C) Common seal

68. The power to adopt a corporate or common seal is incident to all corporations. Under the strict rule of the common law, it was at one time supposed by many that a

corporation, being an artificial person and existing only in contemplation of law, could not manifest its intention by act or speech and could therefore contract only by means of the use of a corporate seal. This rule, however, was illogical and impracticable. It was relaxed to the extent of permitting a corporation to bind itself without the use of a seal in matters of minor importance, such as the employment of servants and the like. In the course of time the rule was still further relaxed, so that at the present day a corporation may contract without a seal to the same extent that an individual may in the absence of charter or statutory restriction.

TRUSTEES OF THE CHRISTIAN CHURCH OF WOLCOTT *v.* JOHNSON, 53 Ind. 273 (1876). Johnson sued the trustees of the Christian Church of Wolcott on a written contract purporting to be the contract of the trustees and signed, "M. T. Didlake, Sec't'y." The trustees contended that the corporation could not be held on this contract because the corporate seal was not attached. *Held*, corporations when not expressly required to contract under their common seals may make valid contracts without using any seal.

69. A corporation may therefore enter into most contracts and make promissory notes and be bound by the acts of its agents within the scope of their authority without the use of a seal, in the same manner as a natural person. The corporate seal is not required in banking transactions or leases, or even in the case of an agreement to sell land.

B. S. GREEN Co. *v.* BLODGETT, 55 Ill. App. 556 (1894). B. S. Green Company, a corporation, was sued on its contract to pay a certain sum as an inducement to the selection of a site for a post office adjoining its place of business. The defendant alleged that the contract was void because the corporate seal was not attached. *Held*, it was not indispensable that the corporate seal be attached to the writing. A seal is necessary only when it would be required if an individual had been contracting, instead of a corporation.

70. This rule, however, does not operate so as to permit a corporation to contract without a seal, where natural persons cannot do so. Therefore, except in those states where the use of seals has been abolished in conveyances of real estate within the state limits, deeds and mortgages of real estate made by a corporation must be executed with the corporate seal.

71. The common law rule was that an *impression* on wax or other tenacious substance constituted a seal. The impression was therefore of the essence of the seal. The wax or other tenacious substance is not now necessary in all jurisdictions. In Connecticut, Georgia, Illinois, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, West Virginia and some other states a valid corporate seal may be made by an impression indented on the bare paper. In Georgia, Illinois, Minnesota, Mississippi, Missouri, New Jersey, Ohio, and Oregon, even a scrawl or scroll of the pen is valid as a corporate seal. A small paper wafer attached to a document, one being set opposite each party's signature has also been regarded in some states as the seal of a corporation executing the instrument, just as it would be in the case of an individual.

(D) To make by-laws

72. Even in the absence of an express grant by charter or statute, a corporation has the power to make by-laws and regulations for its government. Such by-laws and regulations must not be contrary to the corporate charter, to the Federal Constitution and statutes, to the state constitution and statutes, or to public policy. Further, they must be general and operate uniformly on all persons to whom they apply. See Section 54.

KING *v.* INT. BUILDING, etc. Union, 170 Ill. 135 (1897).
Ellen King purchased twenty shares in the International Building,

Loan & Investment Union under an agreement by which, at the end of six years, the Union was to pay her \$100 on each share; during which time she was to pay certain installments. This contract was authorized by a by-law of the Union. A statute of Illinois provided that subscriptions to stock in loan associations must be paid in periodical payments, until the amount paid in, together with the earnings, equaled the face value of the shares. At the end of six years the Union refused to pay King the amount agreed upon. *Held*, the by-law, being inconsistent with the statute, was void. The Union won.

73. Usually the power to make by-laws and regulations for the management of a corporation resides in the stockholders, although in many states statutes have conferred this power upon the directors or other officers. By-laws may generally be repealed and amended by the corporation, by the same parties that have the power to make them in the beginning. See Chapter V.

(E) General contractual powers and liabilities

74. A corporation has power to make any contract which is necessary or proper in carrying out the purposes for which it was created, that is to say, for the transaction of its business. Within the limits of its powers, as defined by charter and statute, a corporation may enter into contracts as freely as a natural person. In the execution of its contracts a corporation must follow the formalities prescribed by its charter or governing statute. The principles governing the use of the corporate seal, the power to make by-laws, the power to acquire personal and real property, and the power to borrow money, are elsewhere stated in this chapter, and need not be repeated here. Many questions affecting the contractual liabilities of a corporation result from an overstepping of the corporate powers by officers or agents. This matter is treated in Chapter VII.

MALONE v. LANCASTER GAS LIGHT & FUEL CO., 182 Pa. 309 (1897). The Lancaster Gas Light & Fuel Company was chartered for the manufacture and supply of illuminating and heating gas to the citizens of Lancaster. Malone, a stockholder, sued the company to restrain it from increasing its bonded debt, alleging that the new debt was to be created for the purpose of obtaining appliances, such as gas stoves and heaters, in order that they might be resold to gas consumers with the hope of stimulating them to use gas for cooking and heating purposes. Malone asserted that this was not authorized by the company's charter. *Held*, this was a legitimate mode of extending the company's business in direct furtherance of its charter purposes. There would be no use manufacturing gas if there were not customers to buy it and hence the company might properly supply not only the gas itself, but incidentally such appliances and conveniences as would induce new customers to use gas or old ones to use more of it.

(F) Acquisition, alienation, and encumbrance of personal and real property

1.—PERSONAL PROPERTY

75. If the law of the state or the corporate charter does not limit the amount of personal property to be held by a corporation, it has power to acquire and hold personalty to any amount, and unless restricted may acquire title thereto in any of the usual ways. This includes the power to take by bequest under the terms of a will. Again, in the absence of restriction, a corporation may hold personal property in trust for purposes consistent with its charter to the same extent as may an individual.

76. In the absence of charter or statutory prohibition, a corporation may freely sell and transfer its property. This unlimited power of alienation includes also the power to lease property, which is but a partial or temporary alienation. Since a corporation may contract debts in furtherance of the objects for which it was created, it ordinarily

has also the power to pledge its property wherever it may lawfully contract a debt.

LEO v. UNION PACIFIC RY. Co., 17 Fed. 273 (1883). Leo sued the railway company to restrain it from raising money on its bonds secured by a pledge in trust of the securities of other roads held by it, to aid in the construction and operation of connecting roads not a part of its own lines. *Held*, a corporation's power to pledge securities owned by it is included in its power to sell them. Leo's application for an injunction was, therefore, denied.

2.—REAL PROPERTY

77. A corporation has also power to acquire and hold such realty, within the state where its charter was granted, as may be necessary or convenient for the proper transaction of its business. This power is inherent in all corporations and will be implied even where the charter or governing statute does not expressly confer it. In most states it is expressly conferred by the charter, subject to the restriction that the lands acquired shall be necessary for corporate purposes. A proceeding by the state is the proper method of testing whether or not lands held by a corporation are held for purposes foreign to those for which the company was created.

MISSOURI VALLEY LAND Co. v. BUSHNELL, 11 Neb. 192 (1881). A man named Blair contracted to sell Bushnell certain lots and then assigned his interest to the Sioux City & Pacific Railroad Company, which in turn assigned to the Missouri Valley Land Company. This suit was brought to collect certain deferred payments and taxes which Bushnell was to pay. Bushnell defended on the ground that the contract with the railroad company was absolutely void, because it was not authorized by its charter to hold or deal in real estate of this description. *Held*, even if this were a fact, Bushnell could not properly utilize it as a defense to an action on a contract through which he acquired property rights in the lots. Where a corporation is incompetent by its charter to take title to real estate, a convey-

ance to it is not void, but merely voidable, and the state is the only outsider that can object. The conveyance is valid until assailed in a proceeding brought directly for that purpose.

78. The following statements as to a company's real estate holdings refer mainly to the acquisition of realty by a corporation within the state where its charter was obtained. For the holding of real estate by foreign corporations is much restricted. Even where a company finds the ownership of certain realty in a foreign state very useful to further its purposes, the law of such state may probably forbid the concern to acquire the desired property. See Chapter XXVII.

79. In Mississippi, the real estate held by corporations must not exceed in value \$1,000,000, except in the case of manufacturing companies which may hold real estate of a value not exceeding \$2,000,000. In Alabama, Arizona, and Indiana the power of corporations to hold real estate is broadly given, as it is also in Delaware, Nevada, Rhode Island, Utah, and Washington, where there is no limitation on the power. Corporations have power to hold and acquire real property in Iowa and Maine "the same as natural persons." In Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Philippine Islands, Porto Rico, South Dakota, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming corporations may acquire such real estate as is necessary for corporate purposes.

80. In almost every state corporations may acquire not only such realty as is necessary for corporate purposes, but also such as is obtained in payment of or as security for

debts. Lands acquired in payment of debts must in Illinois be offered at public auction at least once a year, and if not sold in five years the state's attorney will proceed by information and have a sale compelled. In Kentucky, lands not necessary for corporate purposes escheat to the state if held longer than five years, and in Louisiana and Michigan lands so held are forfeited after ten years. Minnesota requires that lands taken in payment of or as security for debts be disposed of in ten years. New Hampshire provides that real property taken in payment of debts in excess of the amount limited by charter or statute must be sold within five years after title thereto is perfected. Texas directs that lands taken otherwise than for corporate purposes or in payment of or as security for debts must be conveyed within fifteen years after acquisition.

81. The power to purchase and hold such real property as the purposes of the corporation may render necessary or proper includes also the power to take real estate by devise under a will, unless such power is denied by charter or statute. Where a corporation's charter prohibits it from taking land by devise, it cannot acquire lands in another state in this way, even though corporations chartered in the latter state may acquire lands by devise.

STARKWEATHER et al. v. AMERICAN BIBLE SOCIETY, 72 Ill. 50 (1874). Starkweather and others, as heirs at law of Charles R. Starkweather, sued to establish their title to certain real estate situated in Illinois, devised by Charles R. Starkweather to the American Bible Society. This corporation, under the laws of New York, where it was chartered, was incapable of acquiring title to real estate by devise. *Held*, the real estate devised to the corporation should go instead to the testator's heirs at law. A corporation, created by the laws of a foreign state, which by the laws of such state cannot there acquire and hold realty by devise, is incapable of acquiring realty by devise in another state.

82. All corporations, except as restricted by charter or statute, have power to sell and convey their real estate. And, since the greater includes the less, they have power also to lease their real property, which is but a temporary alienation, and to mortgage it, which is a conditional alienation. But while corporations have an unlimited power of alienation, they will not be permitted to convey or mortgage their property for other than corporate purposes.

LANGOLF *et al.* v. SEIBERLITCH *et al.*, 2 Pars. Eq. Cas. (Pa.) 64 (1851). A church charter vested the corporation's property in a board of trustees who were to be elected annually by the pewholders. The trustees attempted to convey the church property, and the execution of the trusts incident thereto, to third persons, vesting the control in them and their appointees perpetually and divesting the corporation of it. Langolf and other pewholders applied for an injunction. *Held*, a court of equity will interfere to prevent a disposition of corporation property for other than corporate purposes. The power vested in trustees or directors to convey corporate property, like all other powers vested from necessity in agents, must be executed in good faith, and for the ends and objects for which they were imparted.

(G) Power to borrow money

83. In the absence of express restriction, corporations are presumed to have power to borrow money for the transaction of their legitimate business. But in some states the amount of money which a corporation may borrow is limited by charter or statute.

ARAPAHOE CATTLE AND LAND CO. v. STEVENS, 13 Colo. 534 (1889). The Arapahoe Cattle and Land Company was organized to raise cattle and deal in land. It agreed with Stevens to give him stock in the corporation to the amount of one third of any loan (up to \$15,000) which he should procure to be made to it. Stevens procured a loan to the company from the Union Bank for \$5,000, and

brought suit to compel the officers of the cattle company to issue to him the stipulated number of shares of stock. *Held*, the contract was good, as companies of this kind have implied power to borrow money for carrying on their business and may make contracts to secure the placing of such loans. Stevens won.

(H) Power with respect to negotiable instruments

84. Coexistent with the power to contract debts is the power to make and indorse negotiable instruments in furtherance of the objects for which the corporation was created. This power will also be implied in the absence of an express restriction. Corporations therefore have power to issue bills of exchange, bonds, checks, drafts, and promissory notes when not repugnant to corporate purposes. But many companies are not allowed to become accommodation makers or indorsers.

HUTCHINSON v. SUTTON MFG. Co., 57 Fed. 998 (1893). *Hutchinson*, a stockholder in the Hopper Lumber and Manufacturing Company, filed a bill in equity to set aside a preferential mortgage executed by the Hopper Company to the Sutton Manufacturing Company. The mortgage had been given to secure the Sutton Company from loss by reason of payments made and of liabilities incurred on account of paper accepted by it for the Hopper Company's accommodation. *Held*, the directors of a business corporation have no authority to divert the company's property from the proper channels by issuing accommodation paper, or otherwise lending its money or credit without consideration. As the same persons were directors of the two concerns, the mortgage must be set aside. It was designed to protect the directors of the Sutton Company against personal liability for their maladministration in accepting paper for the Hopper Company's accommodation.

(I) Power to acquire stock or to combine with other corporations

85. In the absence of express authority, a corporation may not enter into a partnership or combine with another

corporation. Neither may it in most jurisdictions take and hold stock in other corporations except in payment of or as security for debt. And even the power to take another company's stock in collecting or securing a debt is denied in Alaska, California, Colorado, District of Columbia, Georgia, Idaho, Oklahoma (where the two corporations are engaged in similar business), and Porto Rico (as to agricultural corporations). Usually a corporation may purchase its own stock, if the purchase does not harm corporate creditors. See Chapter XXV.

QUESTIONS

1. By what are the powers of a corporation defined? In what two ways may powers be granted to corporations?
2. Name the "common law" or implied powers of corporations.
3. What is meant by the saying "a corporation never dies"?
4. What is the maximum period for the duration of corporate existence in your state?
5. Why is a name necessary for a corporation?
6. The Jackson Shoe Company was chartered in the state of Missouri. It appeared that the incorporators had omitted to give the corporation any name when they filed the certificate of incorporation, but the company had always been known by the above mentioned name. In a proceeding in which the existence of the corporation could be called in question, it was contended that a corporation could not exist without a name, and that therefore the Jackson Shoe Company was not really a corporation. How would you decide the case?
7. What restrictions on the choice of a corporate name are there in your state?
8. What was the common law rule as to the use of a seal by a corporation?
9. The Casey Heating Company executed a deed purporting to convey some of its real estate to John Dobson. The heating company neglected to attach its corporate seal, and on discovering this fact offered to return the money and declare the deed void. Dob-

son claimed that the deed was valid. Did a good title pass to Dobson?

10. The by-laws of the Montpelier National Bank provided that stockholders should be liable for only the par value of their stock and not for double that amount, as the United States statute required. After the bank failed, Bertram, the receiver, sued several of the stockholders to recover the par value of their stock, although they had already paid the amount of their respective subscriptions. The stockholders pleaded the by-law in defense. Who wins?

11. What limitation is there on the power of a corporation to enter into contracts?

12. May a corporation take personalty bequeathed to it by will?

13. The Woodbury Trust Company was chartered to do a general banking and trust company business. It bought a large tract of land at a bargain and proceeded to lay it out in building lots, advertise the property extensively, and sell the land at a profit. Winton, a stockholder of the company, was the owner of land adjacent to that of the trust company and his business of selling lots was hurt by the very prosperous trade in building lots done by the company. Winton sought an injunction to prevent the company from continuing this business. Should the injunction be granted?

14. Is there a limit to the amount of real estate which a corporation may hold in your state?

15. Has a corporation power to borrow money and give negotiable paper for it?

16. The Jenkins Wool Company, Inc., became accommodation indorser on a note discounted by Ralston at the Fifth National Bank. The bank knew that the wool company signed the note for the accommodation of Ralston, but paid the money. In a subsequent suit by the bank against the wool company, which wins?

17. May a corporation be a partner? May a corporation hold stock in another company?

CHAPTER VII

THE EFFECT OF OVERSTEPPING CORPORATE POWERS

86. Whenever a corporation assumes to do an act which it lacks authority to do, this act is said to be *ultra vires*, that is, beyond or in excess of the corporate powers. The corporation may not be authorized so to act, (1) because the act is not within the scope of the express or implied powers of the corporation or the purposes of its creation, or (2) because the act is prohibited by charter, statute, or constitution, or (3) simply because it is an illegal act, whether performed by corporations or individuals. This chapter will discuss the rights and liabilities which may arise when a corporation oversteps its powers and assumes to do unauthorized acts.

87. Three reasons have been given why a corporate contract beyond the powers conferred by the legislature, and varying from the objects of the creation of the corporation as declared in the law of its organization, is unenforceable: (1) The interests of the public that the corporation shall not transcend the powers granted; (2) the interests of the stockholders that the capital shall not be subjected to the risks of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; (3) the obligation of everyone entering into a contract with the corporation to take notice of the legal limits of its powers.

(A) Contracts *ultra vires* because not within the scope of the company's express or implied powers

1.—CONTRACTS EXECUTORY ON BOTH SIDES

88. In its simplest form the doctrine of *ultra vires* is that where a contract is wholly executory, neither party can enforce it by an action either for specific performance or for damages. Therefore, where neither party has started to perform an *ultra vires* contract the courts will not lend their aid to parties seeking to enforce such contract. Ordinarily, the only loss which either party suffers in the case of a wholly executory *ultra vires* contract is the loss of future profits. This loss does not avail against the above named reasons which urge the courts to declare *ultra vires* contracts void and unenforceable.

SIMMONS v. TROY IRON WORKS, 92 Ala. 427 (1890). The Troy Iron Works was organized for the purpose of "manufacturing, repairing, buying, selling, and operating machinery of all kinds, and all such other business pertaining or belonging to machine shops or foundries." Simmons sued for damages resulting from the company's breach of its contract to furnish him with ice weekly. *Held*, the contract was *ultra vires* and Simmons could not recover. The Troy Iron Works had no power to carry on any business not authorized by law, and not necessary to carry into effect the purposes of its organization. The manufacture of ice was as foreign to the company's purposes as any kind of business could well be.

SCREVEN HOSE CO. v. PHILPOT, 53 Ga. 625 (1875). The Screven Hose Company was chartered for the purpose of keeping a hose carriage and hose with which to extinguish fires. Philpot contracted to furnish a steamboat to convey the members of the hose company and their friends on a pleasure excursion. He failed to perform his contract, and the hose company sued for damages. Philpot defended on the ground that the hose company had no power to make such a contract. *Held*, the hose company could not recover, as the contract was for a purpose not contemplated by its charter.

2.—CONTRACTS EXECUTED BY INDIVIDUAL PLAINTIFF

89. Where an individual has, in good faith, performed his part of an *ultra vires* contract and the corporation has received the fruits of his performance, the corporation may not usually defeat an action brought on the contract itself by setting up the defense that it is *ultra vires*.

DARST *v.* GALE, 83 Ill. 137 (1876). The Peoria Fire & Marine Insurance Company executed a deed of trust to Gale and others to secure the payment of certain bonds, giving a mortgage on the company's real estate. The company had received money from the disposition of the bonds. Darst acquired the mortgaged premises from Comstock, who had purchased them at a public sale held by the receiver of the insurance company. Then Darst filed a bill in equity to enjoin the trustee from selling the premises and to declare the deed of trust void. *Held*, a private corporation cannot set up the defense of *ultra vires* where the contract has been performed by the other party and the corporation has had the benefit of his performance. The fact that the company's deed of trust and mortgage were *ultra vires* should not prevail in favor of Darst, who had what title the corporation formerly held, when instead of advancing justice it would accomplish a wrong.

TENNESSEE ICE CO. *v.* RAINE, 107 Tenn. 151 (1901). Raine filed a bill to wind up the ice company as an insolvent corporation. The Schlitz Brewing Company petitioned to be allowed to prove its claim against the ice company for beer sold to the ice company and resold by it. A creditor of the ice company objected, because the ice company was not authorized to buy and sell beer, and the contract was therefore void. *Held*, when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed and the corporation has received the benefits of it, the plea of *ultra vires* will not be heeded.

90. But in the United States courts, and in Massachusetts and some other states, it is held that individuals dealing with corporations are bound to know the limitations

of the corporate powers, and, therefore, if they enter into an *ultra vires* contract with a corporation, even though they fully perform their part of such contract, they cannot hold the corporation liable on the contract itself. And this rule is applied throughout the Union to *ultra vires* contracts made by a public corporation.

DAVIS *v.* OLD COLONY R. R. Co., 131 Mass. 258 (1881). The Old Colony Railroad Company, believing that the holding of a musical festival would greatly increase its business, agreed to contribute \$6,000 to the expenses of such a festival. In an action on the contract, *held* that the railroad had no power to make such an agreement and therefore no action could be maintained on it.

91. However, while in the jurisdictions just mentioned a corporation cannot be held liable upon the contract itself, it may be obliged, if it has received money or property for a purpose unauthorized by its charter, to return the money or property or to pay the value of what it has received. In such cases the courts say to maintain an action against the corporation is not to affirm, but to disaffirm, the illegal contract. Recovery is allowed not on the contract itself, but on an implied contract on the part of the defendant corporation to return or make compensation for money or property which it had no right to retain.

3.—CONTRACTS EXECUTED BY CORPORATE PLAINTIFF

92. The converse of the principles stated in the foregoing sections is also true. Therefore, where a corporation has fully performed an *ultra vires* contract, the other party, after having received the benefit of the contract, cannot usually set up the defense that it was beyond the company's powers.

4.—CONTRACTS FULLY EXECUTED ON BOTH SIDES

93. Where both parties have fully executed and performed an *ultra vires* contract, neither party can sue in disaffirmance of the contract to recover that with which he has parted. In such cases, only the state or a stockholder may proceed to have the unauthorized corporate action nullified.

HOUGH *v.* COOK COUNTY LAND Co., 73 Ill. 23 (1874). Hough, having deeded certain land to the Cook County Land Company, filed a bill in equity to have the conveyance set aside on the ground that the land company had acquired the land for a purpose not authorized by its charter. *Held*, the contract having been executed, Hough could not have it set aside on the ground that the corporation had exceeded its powers. That question could be raised only by the state or a stockholder.

(B) Contracts *ultra vires* because prohibited by charter or statute

94. If a corporation makes a contract which it is prohibited by statute from making, usually no action can be maintained upon it. The law will not assist either party to such an illegal transaction in any respect, but will leave them both exactly where they have chosen to place themselves.

WORKINGMEN'S BANKING COMPANY *v.* RAUTENBERG, 103 Ill. 460 (1882). The banking company sued Rautenberg on his guaranty of a note made by A. B. Pope. Rautenberg's defense was that Pope was a stockholder and a director of the banking company, and was, at the time the money was loaned him, indebted to the banking company, exclusive of the money loaned on the note, in a sum exceeding 75% of the stock owned by Pope, which was expressly prohibited by statute. *Held*, as the guaranty was in aid of such an illegal contract no recovery could be had thereon.

(C) Contracts ultra vires because illegal

95. A company's contract which involves the element of moral turpitude is, like similar contracts made by individuals, illegal and void on the broad ground of public policy. If such contract is wholly executory, the law will not interfere; and even though one party has partially or fully performed, the aid of the courts cannot be invoked.

(D) Who may question corporate powers

96. In general, a mere stranger having no interest in the transaction cannot properly object that the corporation is overstepping its powers. But a single stockholder, even though all the other stockholders acquiesce, may sue the corporation to enjoin it from the performance of an *ultra vires* act. The fact that the contemplated act will not injure the dissenting stockholder does not prevent his maintaining an action to enjoin its performance.

97. The state may also proceed to set aside an unauthorized corporate act; and in many cases where a corporation acquires lands in excess of its charter powers, the lands may be forfeited to the state in a proceeding instituted by the state for that purpose. See Section 78.

QUESTIONS.

1. What is meant by the words "*ultra vires*"?
2. Give three reasons why a corporate contract beyond the powers conferred by the legislature is unenforceable.
3. Can an *ultra vires* contract executory on both sides be enforced?
4. Snodgrass sued the Excelsior Ice Cream Company for flour which the company had bought to use in making bread and cakes for sale, although its charter gave it power to deal in ice cream only. The ice cream company set up as a defense the fact that the contract was *ultra vires*. Who will win according to the law of your state?

5. May a corporation recover the consideration for an *ultra vires* contract when it has performed its side of the contract?

6. The statutes of the state in which the Carter Manufacturing Company was incorporated prohibited corporations from holding the stock of other companies. Nevertheless, the manufacturing company subscribed for 100 shares of the Burt Fertilizer Company and paid \$1,000 on account of its subscription. When the Burt Fertilizer Company was organized it refused to issue any stock to the manufacturing company. Then the Carter Manufacturing Company sued to recover the sum of \$1,000 paid on account of its subscription. Which company wins in this suit?

7. Who may properly seek to enjoin a corporation from committing an *ultra vires* act?

PART THREE

MANAGEMENT OF CORPORATIONS

CHAPTER VIII

PROMOTERS AND CONTRACTS MADE BY THEM

(A) A promoter's obligations toward his company

98. A promoter is one who helps organize a corporation. When a corporation is started there are usually several promoters. Some of these may take a more active part in the work, and have more influence, than others. The greater influence a promoter has the greater is his responsibility.

99. Before a company has become fully organized, its affairs are usually in the sole charge of the promoters, at least so far as anyone has power to regulate its affairs. And even after organization the regular management installed to conduct the company's business is usually dominated by the promoters, at least in the beginning.

100. A promoter should beware of abusing the power thus obtained by him. He should be guided solely by a regard for the company's best interests. Where his own interests conflict with those of the company, he should try to arrange that any negotiations between himself and the company be conducted on the latter's behalf by capable, independent agents.

PLAQUEMINES TROPICAL FRUIT CO. v. BUCK, 52 N. J. Eq. 219 (1893). Buck agreed to buy from Robert White a certain tract of land for \$25,000. Then Buck organized the Plaquemines Tropical Fruit Company, secured the shareholders, and selected the incorporators and officers. He attended the first meeting of the

directors, at which a resolution was passed to purchase the tract of land for \$150,000, but did not disclose to all his interest in the property. Buck was commissioned to effect the purchase. The company afterwards sued to recover the secret profits which he had made. *Held* that as Buck was the company's sole promoter and its agent, if he wished to sell it a property of his own it was incumbent on him to make full and fair disclosure of his position with respect to the property and to furnish a board of directors capable of forming a competent, impartial judgment as to the wisdom of the purchase. Not having done so, he could not retain any profit which he had made.

WOODBURY HEIGHTS LAND CO. *v.* LOUDENSLAGER, 55 N. J. Eq. 78 (1896). Loudenslager joined with the owner of a tract of land in procuring options of doubtful validity on adjoining tracts. Then he organized the Woodbury Heights Land Company, of which he became president, to purchase the land at an advanced price, under an agreement with his co-promoter alone that he was to receive part of the profits thus realized. He procured deeds conveying all the land to him for a consideration which was really \$66,223, and which was recited in the deeds as \$80,000, and he conveyed the land to the corporation for \$80,000 and four hundred shares of its stock. The company sued Loudenslager to recover the profits realized by him. *Held*, the company was entitled to recover.

101. Many corporations are formed to take over a business previously run by an individual or firm. The change may be made merely to give the concern greater stability or to protect the proprietors from unlimited personal liability for the concern's debts. In such case the responsibility of the promoters to the corporation is not likely to be of any moment, because the same parties are interested from first to last, despite the changed form of organization. But when it is sought to enlist outside capital in a new corporation, the question of the promoter's obligations may become prominent.

102. A person who owns a business, or land, or a patent or other property, may form a corporation with the

object of selling such property to it after its organization. But in this case, if the promoter controls the corporation, and if others are invited, or are to be invited, to take stock in the concern, the promoter must not take unfair advantage of his position. If the transaction between him and the company is subsequently attacked, he must prove that he has acted fairly and above board. But the mere fact that he has sold the property for more than it originally cost him does not render him liable to account for such profit. When he got the property he was not acting for the future company, and what he then paid for it does not settle the question as to the fairness of his dealing at the time of the resale.

EXTER et al. v. SAWYER, 146 Mo. 302 (1898). Sawyer secured an option on a certain tract of land and took steps toward organizing the Edgefield Land and Improvement Company for the purpose of selling the land to it. He sold the tract to the company at a profit. Then he purchased another tract and sold this to the company at a big advance. Exter and others, stockholders in the company, brought suit for the recovery of the money so made by Sawyer. *Held*, owing to his relations with the company, it was Sawyer's duty to advise it of the fact that he had purchased each tract at a much less sum than what he sold it for to the company. For violation of this duty he was adjudged liable.

PITTSBURG MINING CO. v. SPOONER et al., 74 Wis. 307 (1889). Spooner and others, having obtained a right to purchase a mining option for \$20,000, proceeded to form the Pittsburgh Mining Company in order to make such purchase. They represented to the persons whom they induced to subscribe for the stock that the option would cost \$90,000. The subscribers paid the corporation \$100,000 upon their stock. The promoters, as officers of the concern, purchased for it the option. The consideration named was \$90,000, but only \$20,000 was paid. The promoters converted the remaining \$70,000 to their own use. Suit was brought in the company's name to recover the said \$70,000. *Held*, the company had a good cause of action.

DENSMORE OIL Co. *v.* DENSMORE, 64 Pa. 43 (1870). Densmore and two others were the owners of land in the oil regions. They had acquired it with no idea of disposing of it again and had spent over \$100,000 on it. Later they were instrumental in forming the Densmore Oil Company and sold the property to it for \$250,000. Later still the company sued them for an accounting of the profits they had made. It was proved that there had been no fraudulent misrepresentation and that at the rate such property was then selling for in the market, the price received by the defendants was fair and reasonable. *Held*, the company could not recover.

103. Clearer still is a promoter's duty, if, after starting to organize a company, he acquires property in order to resell it to the company. Here he is in a fiduciary relation to the concern at the time he gets the property, and he must account for any profits which he makes on the resale. Of course, if after the company is organized all those interested in it consent to his turning such property over at an advance upon the original price, the promoter may be protected. But even in such case, if outsiders are soon afterwards induced to take stock in the new company, they should be acquainted with the dealings between the concern and its promoter.

104. A promoter should be frank and open with his company. He must not help arrange for the acquisition of property by the company, and also act for the party who is transferring the property, unless he discloses his dual relation. Neither must he accept secret commissions or rebates from those who deal with the company through him. If it is discovered that he has thus betrayed his trust, he can be forced to account for the money improperly received by him.

THE TELEGRAPH *v.* LOETSCHER, 127 Ia. 383 (1904). Ferris Smith, owner of a certain patent right on a mortising machine and of machinery to manufacture the device, arranged with one Loetscher to help him promote a company for the purchase of the patent and machinery. Loetscher was to have a good commission for

accomplishing this result. The Dubuque Specialty Machine Works was organized. Loetscher became a director, advised the purchase of Smith's machinery, and secretly received his commission. Suit was brought against Loetscher on behalf of the company for the money thus received by him. *Held*, the company could recover.

YALE GAS STOVE CO. v. WILCOX, 64 Conn. 101 (1894). John Foley and Jedediah Wilcox agreed that the latter should organize a corporation, to which the former should transfer certain patents at twice the price he was ready to take for them and \$5,000 in capital stock. Half of this price was to be received by Wilcox. The Yale Gas Stove Company was organized. Wilcox became a director and consummated the purchase from Foley. Later the company sued Wilcox to recover all he had received. *Held*, the company was entitled to the secret profits made by Wilcox.

(B) A promoter's right to recover for his expenses and services

105. When a corporation is formed, the promoters almost always advance some money to pay the necessary costs. These costs include the charter bonus exacted by the state, as well as various incidental charges; for instance, notarial and recording fees. See Appendix A. This outlay, which is essential to the company's being granted a charter, is almost always repaid to the promoters out of the corporate treasury without question.

106. Disputes sometimes arise about claims made by promoters for their traveling, clerical, office, and other expenses, in getting the corporation on its feet. Sometimes huge bills are presented covering such outlays, especially in the case of companies formed to unite a number of previously independent concerns. Great expense is often involved in bringing about a consolidation of competing concerns, and those who undergo such expense want to be repaid, and usually demand also that they be compensated for the time and work they have put forth.

107. Ordinarily this matter is amicably adjusted, and the new corporation pays the bills. But when friction arises between contending factions in a corporation, and one faction objects to any such payments, its objection will, as a rule, be sustained by the courts. Most courts are averse to having capital which should be employed to carry on the company's business, diverted to the payment of promoters' expenses in getting up the company. This impairs the capital at the outset. Besides, such improper diversion of some of the company's funds is a sign that the concern may have been organized for speculative stock watering and monopolistic purposes, and not to meet a business necessity. Wherever there is plain need for incorporation, the natural operation of economic laws sends capital in that direction. Extraordinary bills for promoters' services indicate an unhealthy, abnormal condition of things which the courts do not encourage.

ROCKFORD, ROCK ISLAND & ST. LOUIS R. R. CO. *v.* SAGE, 65 Ill. 328 (1872). Sage, a promoter of the railroad company, spent money for surveying the road before the company was organized. After the organization was completed he presented his claim, but the directors did not authorize it to be paid. Sage brought suit. *Held*, the expenses incurred prior to the organization of the company were to be considered gratuitous, in view of the private benefits expected to result from the establishment of the corporation. The property of the stockholders should not be subjected to the incumbrance of such claims which they had no voice in creating.

(C) A company's liability under contracts made by its promoters

108. The system underlying the management of a corporation after it is formed is designed to keep its various agents within bounds. The same design to protect a partly organized company from the confusion and loss which

would otherwise result inclines the courts against recognizing the authority of promoters to bind the concern. At this stage of a company's existence it might easily fall a prey to rascally promoters if, while the management were still loose and unsettled, it could be tied up by contracts entered into on its behalf.

109. The general rule, then, is that no agreements made by promoters in the future corporation's name will necessarily bind it. But if an agreement made for the concern before it is chartered is formally or tacitly adopted by the proper authorities after incorporation, the company is liable thereunder, provided the agreement is in line with the objects for which the charter was granted.

MCARTHUR *v.* TIMES PRINTING Co., 48 Minn. 319 (1892). C. A. Nimocks, a promoter engaged in the organization of the Times Printing Company to publish a newspaper, made a contract with McArthur for his services as advertising solicitor for a year from October 1, 1889, the date at which the company was expected to be organized. Organization was not effected until October 16, but the promoters commenced publication October 1 and McArthur then entered upon his duties. He was discharged the following April and sued to recover for breach of contract. The company alleged it had no contract with him. It was proved that though the board never took formal action in reference to the contract made with McArthur, yet all the directors and officers knew of it at the time of organization or soon afterwards. None of them had objected, but tacitly allowed McArthur to be retained without any new contract. *Held*, McArthur could recover.

GENT *v.* MANUFACTURERS' & MERCHANTS' MUT. INS. Co., 107 Ill. 652 (1883). A number of persons determined to organize a mutual insurance company. They partly complied with statutory requirements, and induced Gent to agree to take insurance on machinery in his factory. Gent gave his note for part of the premium and for the remainder accepted a draft drawn on him by the secretary of the company. Six months later the incorporators fulfilled all the statutory requirements and that night Gent's factory

and machinery were burned. Gent notified the company that he considered it liable. The company canceled the note, draft, and application of Gent and refused to pay the loss, on the ground that it had made no contract and was not bound by the acts and agreements of the corporators before the organization was completed. Gent brought suit. *Held*, the promoters had no power to bind the future company and Gent could not recover.

110. The tacit adoption of such agreement is sometimes inferred from the company's acceptance of benefits accruing to it from the agreement. If the company knows of the terms of the agreement, it cannot well receive and use what comes to it thereunder without at the same time recognizing the obligations which the agreement purports to cast on it.

BOMMER v. AMERICAN, ETC., HINGE MFG. CO., 81 N. Y. 468 (1880). Bommer entered the service of the American Spiral Spring Butt Hinge Manufacturing Company, invented an improvement upon the hinge, and applied for letters patent. Negotiations ensued between him and the officers of the company for the purchase of the patent, which culminated on January 17, 1863, in the execution by him of an assignment to the company in consideration of a royalty to be paid him for every hinge made. The royalties were paid until March, 1864. Bommer sued to recover subsequent royalties. The company alleged that on the date of the assignment it had no corporate existence, that it was not organized until August, 1863, and hence was not bound by the agreement. *Held* that, even if not incorporated when the agreement was made, the company by availing itself of the agreement, enjoying its benefits, acting under it, and in part performing it, adopted it as effectually as if a formal resolution had been passed for that purpose.

SCHREYER v. TURNER FLOURING CO., 29 Ore. 1 (1896). Messrs. Dunbar, Robinson, and Brumfield were the promoters of the Turner Flouring Company. A short time before the company was formally organized, Schreyer loaned these promoters \$1,000 for the purposes of the corporation. After its organization, Robinson, as secretary,

sent Schreyer \$100 in part payment. In letters written to Schreyer on the company's letter heads, Robinson stated that he hoped they would have enough money to pay Schreyer before the debt became due. The company did not pay the balance due, and Schreyer brought action. *Held*, as the company received, accepted, and used the money, Schreyer was entitled to recover from it.

111. If before a company is chartered a contract is made on its behalf by promoters, they are usually personally liable thereon, unless the contract expressly states otherwise. This rule is only fair to the other contracting parties, for the company itself, when formed, is not liable under such contract, at least in the absence of a subsequent adoption thereof.

BANK OF MARSHALLTOWN v. CHURCH FEDERATION OF AMERICA AND ALBROOK, 129 Ia. 268 (1906). Albroom and others were the promoters of a mutual benefit association called Church Federation of America, of which Albroom was to be superintendent. In order to establish the business in a certain town, Albroom agreed to pay R. E. Sears commissions for procuring members at that place. Sears fulfilled his part of the bargain, and assigned his claim to the Bank of Marshalltown. A few days later the articles of incorporation were recorded. The new corporation refused to honor Sears's claim, and suit was begun. The defendants contended that the contract with Sears was unauthorized and could not be ratified, as a statute prohibited the association from employing paid agents in soliciting members. *Held* that, while this was true, Albroom was personally liable for the services performed by Sears.

QUESTIONS

1. What is a promoter? Discuss generally his obligations to the company formed by him.

2. Williamson promotes a company in order that it may buy a patent owned by him. He secures several stockholders and tells them that he owns the patent and that he wants them to form their own independent opinion of what the patent is worth and buy it

from him. He does not tell them, however, that he has several times submitted the patent to an examination by experts and that they have pronounced his invention worthless. The company pays him \$5,000, partly in cash and partly in stock. When the company fails its receiver sues Williamson for \$5,000. Can he recover?

3. Should a promoter ever make a profit out of property which he buys in order to sell to the company?

4. What precautions should a promoter, who has secured land merely as a speculation and who afterwards organizes a corporation to buy it, take in selling this land to his company?

5. Porter was engaged in promoting the Oklahoma Advertising Company. He paid the charter bonus, filing fees, lawyer's fee, and also large sums for the services of canvassers who secured subscriptions for the company. When the company was organized he presented a bill for the foregoing items and for his own personal services in the matter. Should any part or all of this bill be paid? Give reasons.

6. Has a promoter power to bind a corporation by contract?

7. In what ways may a corporation ratify contracts made for it by promoters?

8. Are promoters personally liable on contracts which they have made for their company, when they specify that they act as agents for the future corporation?

CHAPTER IX

THE DIRECTORS

112. A corporation acts only through its agents. The members of the corporation may meet and agree in their collective capacity as a corporation that certain things shall be done, but the actual doing of such things devolves on the company's representatives.

113. In almost every corporation the supervision of current affairs is entrusted to a group of representatives known as the board of directors, but sometimes called trustees or managers. In the charter or by-laws of each corporation is usually to be found a clause specifying the number of directors who shall constitute this board.

114. The statute laws of most states provide that the board shall consist of not less than three members. The minimum number in Ohio and Tennessee is five; in Arizona and Washington, two. Most states do not name any maximum number of directors. But in South Carolina the board must not consist of more than nine directors. In North Dakota, Oklahoma, and South Dakota the maximum number is eleven; in Colorado, Florida, Indiana, Missouri, Montana, and Texas, thirteen; in the District of Columbia and Idaho, fifteen; in Kansas, twenty-four; in Utah, twenty-five; and in Ohio, thirty. In Indiana manufacturing and mining companies the maximum is eleven.

(A) The qualifications of directors

115. In the absence of statutory provision and of any special regulation in the charter or by-laws, no particular

qualifications are required of directors. Foreigners, women married or single, and even minors, are found on the boards of some corporations.

116. The corporation laws of the following states require every director of a company chartered thereunder to be a stockholder: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana (as to mining and manufacturing companies), Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wyoming; also New Mexico and the District of Columbia. In Delaware and Kentucky each director must own three shares of stock.

117. In Massachusetts, New York, and West Virginia each director must be a stockholder, unless the by-laws of a given corporation provide otherwise. But in New York, even in the absence of such by-law provision, the directors for the first year need not be stockholders.

118. In the following states at least one director of a corporation must be a resident of the state where the charter was obtained: Delaware, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Dakota, Utah, Washington. In New Hampshire, at least one must be a resident if the corporation has any stockholders residing within the state. In Vermont, at least two directors must be residents. In Pennsylvania, at least one third of the board must be residents. In California, Oregon, Alaska, and the District of Columbia, a majority must be residents. In Indiana, all directors of mining and manufacturing companies must be residents of the United States. In West Virginia, all directors must be residents of the state unless the by-laws provide otherwise.

119. In Idaho and Maryland, at least one director must be a citizen and resident. In Kansas, at least three must

be citizens. In Missouri, at least three must be citizens and residents. In Washington, a majority must be citizens of the United States. In Ohio, a majority must be citizens of the state.

(B) Meetings of directors

120. The board acts as a group. Usually, extensive powers are granted to the directors in their collective capacity, but as a rule no power is lodged in a single member of the board merely by virtue of his being chosen one of the directors. A director may be specially empowered to act for the company, as when he is appointed a committee of one to take charge of certain matters for the board. But in the absence of such delegation of authority, he is, by himself, powerless. However, any director may ordinarily, without consulting his fellow directors, inspect the company's books and papers and investigate its business, for by so doing he is the better enabled to discharge his duties to the company.

Sias v. CONSOLIDATED LIGHTING Co., 73 Vt. 35 (1901). Sias, an employee of the lighting company, was injured by the fall of a pole, at the top of which he was working. Dr. Kemp, a director of the company, went to see Sias and told the physician in charge to go on with the case, in consequence of which the doctor sent his bill to the company. Sias sued the company for damages, and claimed that these facts showed a recognition of liability by the company. *Held*, nothing appeared showing authority in Dr. Kemp except that he was a director, and the mere fact that he was a director did not authorize him to act for the company in this matter. Sias, having failed to prove his case, could not recover.

BALDWIN v. CANFIELD, 26 Minn. 43 (1879). All the directors of a certain corporation, acting separately and not as a board, executed a deed to real estate belonging to the company. Baldwin and others, to whom some shares of the company's stock had been pledged as collateral security for notes due them, brought suit to have the

deed canceled as being illegal. *Held*, the deed was void. The directors could not bind the corporation by their separate and individual action.

121. Most boards have regular meetings which are usually provided for in the by-laws. Besides these stated meetings, special meetings may be called from time to time when the need presents itself. Ordinarily, each director should be notified of a special meeting a reasonable time beforehand, so that he may arrange to attend it. The by-laws of many companies regulate the manner of calling special meetings and the procedure at both regular and special meetings. See Section 56.

122. The board meetings should be formally convened and the proceedings should be carried through with due regard to parliamentary methods. The transactions of the board ought to be carefully recorded in a minute book. The secretary of some corporations is charged with the duty of attending board and committee meetings and keeping a record of what is done. Ordinarily, at the beginning of each meeting, the minutes of the last previous meeting are read, and they are revised if any error or omission is pointed out.

123. Generally, a majority of the whole board must be present at a meeting in order that the proceedings may be valid. The following states allow the size of a quorum to be fixed by the by-laws of each corporation: Colorado, Florida, Louisiana, Massachusetts, Missouri, New Jersey, North Carolina, Rhode Island, Utah, and Wyoming; also the District of Columbia. In Indiana, a corporation's charter may regulate this matter.

HAX v. DAVIS MILL Co., 39 Mo. App. 453 (1889). Hax and three others owned the entire stock of a milling corporation. These four were the directors. Hax was elected president. All the directors were present when the salaries were fixed. The vote taken was two

to one in favor of allowing a certain sum as the president's salary. Hax did not vote. When Hax sued to get his salary, the corporation denied that a salary had been legally voted to him. *Held*, as a majority of all the directors voted on the question and a majority of those voting were for the resolution, it was legally adopted.

124. In the following states the corporation laws make no provision as to what shall constitute a quorum of the board: Georgia, Illinois, Iowa, Maine, Nebraska, North Dakota, Ohio; also Arizona and New Mexico. But even in such cases a majority of the board of directors would usually be deemed necessary to make up a quorum.

125. Under the laws of most states, board meetings may be held outside the state from which a given company has secured its charter, unless that company's by-laws provide otherwise. But the board meetings of Louisiana companies must be held in that state, and so with Texas corporations. So also with Missouri corporations, except mining and railroad companies; and with Oregon corporations, except mining companies. In Pennsylvania, if a majority of the board are citizens of any other state, they may arrange to hold their meetings outside of Pennsylvania, but otherwise the board meetings must be held in Pennsylvania.

126. A director should attend board meetings in person, and cannot act by proxy, for he is expected to give whatever questions come before the board the benefit of his personal thought and judgment. Likewise, when a committee is delegated to look after certain matters, the members of that committee should be actually present at its meetings, and not attempt to act by proxy.

FIRST NAT. BANK OF OMAHA v. EAST OMAHA BOX CO., 90 N. W. (Neb.) 223 (1902). The box company, being pressed by its creditors, made a deed of practically all its property to trustees. The resolution authorizing the execution of the deed was passed at a board meeting where only one director was present, he also voting for another director by proxy. The First National Bank and other

creditors sued the box company to have the deed set aside as void. *Held*, as a director cannot delegate his power to vote in a board of directors by giving his proxy to another person, the resolution authorizing the deed was void.

CRAIG MEDICINE CO. v. MERCHANTS' BANK, 59 Hun (N. Y.) 561 (1891). Four persons owned the stock in the Craig Medicine Company. To one of these, George Hicks, the other three gave power to vote their stock. Hicks elected himself and two others directors. Then at a directors' meeting, Hicks alone being present, with the aid of the proxies of the other two directors he proceeded to elect himself president and treasurer. A question was raised as to the use of proxies at this directors' meeting, it being conceded that proxies might be used at a stockholders' meeting. *Held*, as no director of a corporation can vote at a meeting of the board by proxy, Hicks was not legally elected president and treasurer.

127. The majority of those in attendance at a board meeting, where a quorum is present, may decide questions coming before the board, even though such majority is, by itself, less than a quorum of the board.

LEAVITT v. OXFORD & GENEVA SILVER MINING CO., 3 Utah 265 (1883). Leavitt sued the Mining Company on a promissory note made in the company's name by its president and secretary. The company denied the validity of a board resolution which purported to authorize the execution and delivery of the note to Leavitt. The board consisted of seven members, one of whom was Leavitt himself. The resolution had been passed at a meeting when only four directors, including Leavitt, were present. All four had voted for the resolution, but it was contended that Leavitt's personal interest in the matter disqualified him. *Held*, Leavitt should be counted in making up the necessary quorum of four. His vote in favor of the resolution should not be counted, but it was not needed to validate the note. The larger part of those present could act, even though the three whose votes were to be counted did not, by themselves, make up a quorum.

128. As shown in the foregoing case, if a director's personal interest in a matter brought before the board con-

flicts with the company's interest, his vote in favor of himself should not be counted. This rule applies where a director is to receive a salary for official services to be rendered to the corporation, and generally where he is about to enter into any kind of contract with it.

SMITH *v.* LOS ANGELES CO-OPERATIVE ASSOCIATION, 78 Cal. 289 (1889). Smith sued on a promissory note made in the Co-operative Association's name by T. A. Garey, president of the association, in his own favor, and assigned after maturity to Smith. The defendant denied the validity of a board resolution, under which Garey had acted, that "all notes held by T. A. Garey and also by H. J. Crow be renewed and two per cent interest per month be allowed." There were seven directors, but only four were present at the meeting when this resolution was sought to be passed. Among the four were Garey and Crow themselves. Garey did not vote at all on the resolution, but the other three voted in its favor. Smith contended that, so far as concerned the renewal of Garey's notes, Crow was competent to act. *Held*, Crow was disqualified by his direct interest in the passage of that inseparable part of the resolution which authorized the renewal of his own notes. The two disinterested directors did not constitute a majority of the quorum, so the resolution was void.

129. The board's main function is to direct the company, that is, to shape its policy and to see from time to time that the officers are working along the lines marked out for them. The stated board meetings of most corporations are held once a month. At these meetings reports are usually made by one or more of the officers, showing the company's condition. Frequently, too, one or more committees report concerning affairs in their charge.

130. Very important contracts are usually submitted to the board before being made on behalf of the company by its officers. While the board may, if it pleases, pass upon every detail of corporate management, it generally leaves details to the officers and their subordinates. In

the case of a large company, the board naturally goes less into the minute particulars of the business than in the case of a small concern.

(C) Powers of directors

131. The powers of the board of directors are, in the case of most corporations, defined more or less sharply in the by-laws of each concern. See Section 56. Whether or not the by-laws cover this matter, the board generally has full power to run the corporation. But the directors of a Texas corporation are limited to the powers given them by statute or by the charter or by-laws of their own particular corporation.

132. Ordinarily, the general management of a corporation is intrusted to the directors. The board may therefore act for the company in the formation, assignment, and discharge of contracts relating to its business, and also in beginning, carrying on, and settling lawsuits affecting the company. If the company is insolvent, the directors may make an assignment of its property for the benefit of its creditors, or they may, in most states, formally acknowledge its inability to pay its debts and its willingness to be adjudged a bankrupt under Section 3 (*a*) of the United States Bankruptcy Act. See Section 393.

133. Notice given to the board of directors in a matter concerning a corporation is notice to the corporation itself. It follows that if the board has knowledge that certain things are going on to the company's prejudice, but neglects to assert its rights, the company may, perhaps, be deemed to have waived them. The board's inaction may, therefore, preclude the company from enforcing its rights if they have been invaded with the board's acquiescence, and innocent third parties have thereby been deceived.

134. In almost every state the board has power to elect the president and the other officers provided for in the

by-laws. Moreover, the board may generally appoint subordinate agents from time to time for looking after the company's business, and may dismiss such agents at its discretion. It may also empower such officers and subordinate agents to act for the company in all matters suitable to be entrusted to these persons.

NORTHAMPTON BANK v. PEPOON, 11 Mass. 288 (1814). The directors of the Berkshire Bank executed a power of attorney to Simon Larned, the president, authorizing him on behalf of the corporation to negotiate promissory notes. Larned indorsed to the Northampton Bank a note made by Pepoon, payable to the Berkshire Bank. The Northampton Bank sued Pepoon on this note. Pepoon disputed the plaintiff's title, contending that the directors of the Berkshire Bank had no authority to appoint an agent to negotiate the bank's securities. *Held*, the directors might authorize the president or any other officer of the bank to negotiate promissory notes payable to the bank.

135. In the vast majority of corporations the board is empowered, either by statutory or by-law provision, to supply a vacancy occurring in its own ranks. It is not as a rule necessary for the board to exercise this power, for even though it should not do so its meetings will be valid if attended by a quorum. If a director dies or resigns, and the remaining members of the board appoint a substitute, the latter holds office only during the remainder of the term for which his predecessor was elected by the stockholders. But in case at the end of such term no successor has been chosen, the substitute may hold over until a successor is installed, if there is a rule to that effect governing the company.

HUGUENOT NATIONAL BANK v. STUDWELL, 6 Daly (N. Y.) 13 (1875). The American Hand Pegging Machine Company made several promissory notes which were discounted by the Huguenot National Bank. Suit was brought on these notes against the

machine company's trustees, who by failure to publish a report of the company's condition at a certain date, had, it was claimed, become liable for its debts. The defendants sought to escape liability on the ground that they were not trustees at that date. They had been elected to fill vacancies, and the terms for which their predecessors were chosen had expired before the date named. No successors had been chosen. A statute provided for filling vacancies, and a by-law provided that trustees elected should hold office for one year and until their successors were chosen. *Held*, the defendants must be regarded as trustees of the company at the time of the failure to make the report, and, therefore, they were liable to the bank.

PORTER *v.* LASSEN COUNTY LAND & CATTLE Co., 127 Cal. 261 (1899). The California code provided that a vacancy in a board of directors must be filled by an appointee of the board, and also that a board should consist of not less than five members. Five directors constituted the board of the Lassen County Land & Cattle Company. One director resigned. Before his successor was appointed, the board sanctioned the execution of a mortgage to Porter upon property conveyed to the corporation by him. Porter sued to foreclose the mortgage. The company contended that the mortgage was invalid because of the vacancy in the board. *Held*, the majority of a full board having authorized the resolution, the mortgage was valid.

136. Ordinarily the board may turn over some of its work to committees, appointed from among its own members. Such committees are of two kinds, standing committees and special committees. Many companies have several standing committees, such as an executive committee, a finance committee, and a property committee. Besides, special committees may be appointed from time to time when a temporary need arises for them. The minutes of the board meeting, at which any special committee is appointed, should show whether the committee is merely deputed to investigate matters and report to the board, or

is empowered to act according to the best judgment of the committeemen. The by-laws of many corporations define the powers of the standing committees and regulate the appointment of both standing and special committees. See Section 56.

SHERIDAN ELECTRIC LIGHT CO. v. CHATHAM NATIONAL BANK,^{*} 127 N. Y. 517 (1891). The executive committee of the Sheridan Electric Light Company executed a power of attorney giving William Shepard, one of its members, authority to form companies in Ohio for the sale of machines made under the Sheridan patents, and to sign all papers to carry out such transactions. Under this authority Shepard indorsed checks drawn to the Sheridan Company, which checks were discounted by the Chatham National Bank. The Sheridan Company sued the Chatham Bank for an alleged misappropriation of the checks, claiming that the power of attorney was invalid because given by the executive committee. *Held* that the statute which gives directors the power to appoint agents implies the power to select committees, and that the executive committee could in its turn empower Shepard to act for the Sheridan Company in the matters under consideration.

FEE v. NATIONAL MASONIC ACCIDENT ASSOCIATION, 110 Ia. 271 (1900). The charter of the National Masonic Accident Association provided for the election of nine directors, and gave them power to enact by-laws and to appoint an executive committee of its members for supervising its affairs. The board passed a by-law empowering the executive committee to levy assessments. The committee levied an assessment which Fee failed to pay within the specified time. A few days later he forwarded the payment, but before it reached the company Fee was injured. Fee sued the company to recover for his injuries. The defense was that failure to make prompt payment suspended Fee's certificate. Fee asserted that as the assessment had been made by the executive committee appointed by the board it was illegal, alleging that the board could not delegate this authority. *Held*, as the board was authorized to adopt the by-law under which the executive committee made the assessment, it was valid. Fee lost his case.

137. The board may, in most states, decide when the capital stock shall be issued, and whether cash, property, or services shall be taken in payment for it. Moreover, if property or services are received in payment for stock, the valuation of such property or services is usually left to the board. See Section 44.

VAN COTT v. VAN BRUNT, 82 N. Y. 535 (1880). Van Brunt, the president and a director of the Hudson Avenue Railroad Company, entered into a contract with one Cowperthwaite, who agreed to build and equip a portion of the road for a certain sum in stock and bonds of the company. This contract was assigned to Van Brunt, who performed it at an expense less than the par value of the stock and bonds agreed to be paid Cowperthwaite, and received by Van Brunt under the assignment. The company failed. Its receiver, Van Cott, sued to recover the difference. *Held*, officers of a railroad corporation may lawfully contract to have its road built and to pay for the construction work in stock and bonds, and the securities so transferred are to be deemed full paid, even though the actual cost of the work to the contractors may be less than the par value of the securities. Van Brunt won.

138. If a part of the stock subscriptions remains unpaid, the directors may usually call in this remaining part from time to time as they think fit. But if the terms of the subscriptions fix the date of payment, the board cannot usually force the subscribers to pay ahead of time. See Chapter XII. The declaration of dividends is almost always for the board to consider and pass upon finally. See Chapter XVII.

CHOUTEAU INSURANCE Co. v. FLOYD, 74 Mo. 286 (1881). Floyd subscribed for fifteen shares of the Chouteau Insurance Company's stock at the par value of \$100. He paid down \$21 on each share. Later the board of directors made a call for a further payment of twenty-five per cent upon the capital stock. Floyd paid his assessment. Still later another twenty-five per cent assessment was made,

which Floyd refused to pay. The company sued to force him to do so. In defense, he alleged that there was no necessity for the assessment last made upon the stock. *Held*, this was a matter for the board of directors to determine. The company could recover.

139. The following is a form of notice to stockholders that an assessment must be paid on their shares.

WESTERN HARVESTER COMPANY

INDIANAPOLIS, INDIANA.

June 1, 1910.

To the Stockholders:

You are hereby notified that at a regular meeting of the Board of Directors, held May 27th, 1910, a resolution was adopted calling for payment of an assessment of fifteen dollars (\$15.00) per share upon the shares of stock of the Western Harvester Company, payable to the said company at its office, 1511 Bridge Street, Indianapolis, Ind., on September 12th, 1910. This is an assessment of 30% upon the par value (\$50) of the said shares.

No transfer will be made of any certificate whereon payment of any installment which is due shall not have been made.

By order of the Board of Directors.

(Signed) SAMUEL HARKINS,
Secretary.

Note.—Please bring your stock certificates with you when paying the said assessment.

140. But while the directors have these extensive powers in running the company's business, there are many things which they cannot do on behalf of the company without the consent of its real proprietors, the stockholders. See Section 244. Thus, in the absence of express authority, the board lacks power to alter the nature of the company's

business or to change the corporate organization in any other fundamental matter, unless and until the stockholders formally declare themselves in favor of the change. Therefore, as a rule, no amendment to the charter, requiring the corporation's consent, will be made by the public authorities at the instance of the directors merely. A stockholders' meeting should be called to sanction such proposed amendment.

Exception: In Tennessee the directors may, without consulting the stockholders, apply to the governor for a charter amendment.

MISSISSIPPI, ETC., *R. R. Co. v. GASTER*, 24 Ark. 96 (1863). The railroad company sued Gaster for assessments upon twenty-five shares of the company's stock, subscribed for by him. Gaster defended on the ground that an act of the Arkansas Legislature, amending the charter of the company and sanctioning a material and unwarrantable departure from the route of the road as designated in the original charter, had been accepted by the directors, and that the object of the corporation was so materially changed as to justify him in refusing to pay any assessments. *Held*, the directors could not accept such an amendment so as to make it valid and binding upon the corporation. Hence, Gaster was not thereby released from his subscription contract.

RAILWAY CO. *v. ALLERTON*, 18 Wall. (U. S.) 233 (1873). The directors of the Chicago City Railway Company, without consulting the stockholders, resolved to increase the company's capital stock from \$1,250,000 to \$1,500,000. To this Allerton, a stockholder, objected. He filed a bill in equity for an injunction to prevent the contemplated increase. The railway company relied on a provision of its charter setting forth that "all the corporate powers of said corporation shall be vested in and exercised by a board of directors." *Held* that a change so organic and fundamental as increasing the capital stock of a corporation beyond the limit fixed by its charter could not be made by the directors alone, unless expressly authorized. The general power to perform "all corporate acts" referred to the concern's ordinary business. The injunction was granted.

141. Even an amendment to the by-laws must, in most states, be adopted by the stockholders before it can take effect.' See Sections 48 and 49.

142. A sale of all a corporation's property, if it will result in putting the concern out of business, should not be undertaken by the directors without the stockholders' approval. Likewise a lease of the company's property, which will terminate its active operations, should be passed on by the stockholders. The same rule holds true as regards any merger or consolidation of the corporation with another company. See Chapters XXV and XXVI.

CASS *v.* MANCHESTER IRON & STEEL Co., 9 Fed. 640 (1881). A majority of the Manchester Iron and Steel Company's board determined to lease the concern's whole plant for a term of not less than five years, the lessee to have an option to buy the property. Cass, who owned most of the company's stock, asked the court to restrain the proposed action of the directors. *Held*, the change proposed, though not organic, was thorough and fundamental. It could not be made by the directors unless they were expressly authorized. Cass won.

143. While a corporation remains solvent the directors should not take proceedings to dissolve it or to abandon its charter unless the stockholders consent. See Chapter XXIII.

144. It is sometimes deemed prudent to consult the stockholders even about matters which lie within the board's discretion where the interests involved are important and there is room for a conflict of opinion. In such matters, the wishes of the stockholders may be learned from private interviews, because, by supposition, no formal meeting is legally necessary. Of course, if the board refers any matter to a stockholders' meeting, it should abide by the decision there reached.

KELSEY *v.* NEW ENGLAND STREET RAILWAY Co., 60 N. J. Eq. 230 (1900). The railway company by its board of directors em-

powered a committee to give Kelsey an option upon certain stock, subject to ratification by the stockholders. A stockholders' meeting was held, and a majority of them voted against carrying out the option agreement. Kelsey sued the company to enforce the agreement. *Held* that it was not binding on the company unless ratified by the stockholders. According to the terms of the board resolution, the scope of the committee's agency was limited. Ratification by the stockholders was necessary to bind the company.

(D) Duties and liabilities of directors

145. A director's duties are sometimes defined in his company's charter or by-laws. See Section 56. Accordingly, every director should secure a copy of the charter and by-laws and make himself familiar with them. See Section 51.

146. Again, a director may undertake duties which are imposed upon him by express resolution of the board, or which rest on a board committee whereof he becomes a member. Whatever work he thus assumes he must attend to diligently.

HORN SILVER MINING CO. v. RYAN, 42 Minn. 196 (1889). The mining company sued to recover from Ryan for his neglect of duty as one of its directors, whereby the company's president and vice president were enabled to misappropriate large sums of its money. It appeared that Ryan had known of these misappropriations and that he had failed to make any effort to prevent them or to bring them to the notice of the board or the shareholders. He had also negligently failed to attend the board meetings. *Held*, since Ryan wholly neglected his duty, and since by reason of his neglect the company was damaged, he could be held liable.

147. As a trusted representative of the stockholders, a director must display perfect good faith in his dealings with the corporation. He should not take advantage of his position to make secret profits. If he abuses his trust in this way, he may, upon being exposed, be forced to

account to the company for whatever money he has thus illicitly made. See Chapter VIII (A).

PARKER *et al. v. NICKERSON*, 112 Mass. 195 (1873). The defendants were a majority of the board of directors of the East Boston Ferry Company. After being elected directors, they had bought in their own name the steamboat *John Adams*. Later, acting as directors, they bought her on behalf of the company from themselves, at a price much greater than her real value. The company failed, and its receivers sued to make the directors account for the profit realized by them on this resale. *Held*, the transaction was fraudulent. The profit made by the directors should enure to the company's benefit and the receivers could recover it from the directors.

148. Directors seldom receive compensation for their services. See Section 155. Hence, they cannot be expected to devote their entire time to the company's business or to do much beyond attending board meetings and discharging the duties expressly assumed by them as indicated in the preceding paragraphs. The main burden of running the company is usually laid on the company's officials and subordinate agents.

149. An agent is rarely held to guarantee the successful outcome of his principal's affairs, unless he expressly assumes such heavy liability. This rule especially applies to directors, who usually receive little or nothing for their services. Therefore, if a company fails in business, its directors are not liable to the creditors or stockholders for the failure unless they have helped cause it by their neglect or other breach of duty. The mere fact that the directors have shown bad judgment does not make them liable for the resulting loss. They do not warrant that they will wisely exercise the powers vested in them.

SMITH *v. PRATTVILLE MFG. Co.*, 29 Ala. 503 (1857). Smith sued to force the directors of the Prattville Manufacturing Company to

make good a loss resulting to the company from their having compromised its claim against its commission merchants in New Orleans. *Held*, in the absence of fraud, bad faith, or gross neglect, the directors were not liable. A mere error of judgment on their part in settling the company's claim for less than could have been recovered from the commission merchants was not enough ground for a suit against them.

150. If one director embezzles the company's funds, or otherwise involves it in loss, his fellow directors are not liable, unless they have participated or acquiesced in his default. Likewise, the directors are not responsible for the misconduct of the officers or other employees chosen by them, unless such choice has been negligently made. But in any such case if the loss befalling the company would have been avoided, except for the directors' gross inattention to duty, their mere ignorance of what was going on will not shield them from responsibility.

FISHER v. GRAVES, 80 Fed. 590 (1897). The receivers of the American Casualty Insurance and Security Company sued Graves, a director of the company, charging him with liability for the negligent acts of his co-directors in making certain loans which had involved the concern in heavy losses. *Held*, as it did not appear that Graves had participated in the misdeeds of the other directors, the case against him was not made out. Graves won.

RICKER v. HALL, 69 N. H. 592 (1899). Ricker, a stockholder in the Dover National Bank, sued Hall and other directors of the bank, to hold them personally liable for a loss occasioned by the cashier's embezzlements. The directors, through their committee, had made an investigation of the bank's condition twice a year, in addition to the investigations of the bank examiner, without discovering the cashier's shortage. The embezzlements had extended over ten years, during which time the cashier bore an excellent reputation. *Held*, the directors had exercised due care in the management of the bank, though they knew the cashier had lost \$4,000 in stock speculations four years before they elected him.

151. It would be impossible to list all the various ways whereby a director may depart from the clear path of duty and render himself liable for loss resulting to his company. One such matter on which the enactments of almost every state lay special stress, concerns the improper payment of dividends. As to this, see Sections 293-295.

152. The improper reduction of the capital stock by distributing part of it among the stockholders, is much like the improper payment of dividends. It deprives the company's creditors of part of the fund to which they may rightfully look for payment. Accordingly, in most states it is held that directors who assent to such improper reduction and distribution are personally liable for the loss thereby suffered.

153. Again, in some states which forbid a company to create indebtedness beyond the amount of its capital stock, any director concurring in an excessive increase of the company's debts is personally liable for such excess.

154. Many states impose penalties on the directors for omitting to file certain required reports and for disobedience to various other statutory requirements. It is wise, therefore, for a director to study the duties placed upon him by statute law.

(E) Rights of directors

1.—COMPENSATION FOR SERVICE

155. Directors usually receive nothing for their services rendered as members of the board. But some corporations, in order to encourage regular attendance at board and committee meetings, pay a small sum to each director present at such meetings. This sum varies in amount, but is generally fixed at five or ten dollars.

156. Of course, when a member of the board is duly elected to an official position which pays a salary, he is

entitled to receive such salary. Likewise, when he is specially engaged to render the company services outside his duties as director under an express agreement that he shall be paid. In the case last mentioned, even when there is no express agreement to pay for the director's extraordinary services, such agreement will usually be implied.

BOGART v. NEW YORK & LONG ISLAND R. R. Co., 102 N. Y. Supp. 1093 (1907). Bogart, a director of the railroad company, was appointed consulting engineer by the board of directors without any salary's being fixed. Later on, he was elected secretary, but continued to render services as consulting engineer in connection with a contemplated extension of the railroad. For these services Bogart sought to recover. *Held*, the fact that Bogart was a director and an officer of the company did not preclude him from recovering the reasonable value of his services as engineer.

157. But a director cannot usually force a corporation to abide by the terms of a board resolution fixing his compensation if his own vote was cast in favor of such resolution and was necessary to carry it. See Sections 128 and 158.

2.—OTHER CONTRACTS WITH THE COMPANY

158. The statements in the preceding section apply to almost all contracts between a director and his own company. Indeed, in New Jersey, New York, and a few other states, a corporation may set aside a contract which it has made with one of its directors though he did not vote as a director in favor of making such contract and though no unfairness is shown. This strict rule is defended on the ground that the close relation between the two contracting parties gives the director a chance to use undue influence in ways which are not open to detection.

PORT AND OTHERS v. RUSSELL AND OTHERS, 36 Ind. 60 (1871). The directors of a gravel road company made a contract with two

persons, one of whom was a member of the board, for constructing a road. Russell and others, stockholders of the company, asked for an injunction to restrain the company from paying any money under the contract. *Held*, a director of a company cannot contract with it or have any pecuniary interest in a contract made between his company and a third person. Therefore the injunction was granted.

159. Sometimes, when a corporation repudiates a contract made with one of its directors, and this contract has already been partly or wholly fulfilled by the director, the courts decline to enforce the foregoing rules in all their strictness. Compare Chapter VII (A). The same rule applies to voidable contracts made by two corporations through their respective boards of directors where members of each company's board are interested in the other company.

UNITED STATES ROLLING STOCK CO. *v.* ATLANTIC & GREAT WESTERN R. R. CO., 34 Oh. St. 450 (1878). The plaintiff and the defendant, by their respective boards of directors, made a contract whereby the plaintiff agreed to supply the defendant with all the rolling stock required in the operation of its road for seven years. Five persons composing the plaintiff's board of directors were also members of the defendant's board, which consisted of thirteen persons. After the plaintiff had supplied rolling stock for over two years, the defendant sought to repudiate the contract, relying upon the dual relation of the plaintiff's five directors as an excuse for this action. The plaintiff sued to recover for the use of the stock. *Held*, the delay in attacking the contract, and the acceptance of part performance under it, amounted to a waiver of the defendant's right to avoid it.

3.—DIRECTORS AS CREDITORS OF AN INSOLVENT COMPANY

160. When directors of a failing company have claims against it, they should beware of taking advantage of their position to prefer themselves over other creditors. They

may, however, take steps to protect their own interests, provided that in so doing they will not sacrifice the interests of outside creditors.

161. When a director realizes that his company is in financial trouble, he should not take measures to have his own claims against it paid or secured, if this will impair the rights of other creditors. But if he has already obtained security for his claim, at a time when he could properly do so, he is not precluded from foreclosing such security. Neither is he precluded from purchasing the company's property at a foreclosure sale instituted by himself or other creditors, where he has interests to protect. This rule applies also to various judicial and other sales where an insolvent company's property is put up and a director needs to buy it in for himself in order to preserve his own private rights.

McMURTRY *v.* MONTGOMERY MASONIC TEMPLE Co., 86 Ky. 206 (1887). The temple company mortgaged its property to three directors, who guaranteed the company's payment of a certain loan. The company became insolvent. The directors, being forced to pay the loan, foreclosed the mortgage. McMurtry, a creditor of the company, sued to have the proceeds of the mortgage sale held in trust for creditors generally, disputing the directors' claim to prior payment out of such proceeds. *Held*, the directors had the right to enforce the mortgage by foreclosure and sale for their own benefit.

162. The foregoing rules, enabling directors to look after their own rights provided they do not trample on those of other creditors, work justice in the vast majority of cases. If different rules were in force, a company in financial difficulty might be unable to tide over its trouble, for then the insiders are often the only ones willing to help it. Thus, if these insiders could not stipulate for whatever security the company might be able to furnish, if they could not protect themselves against the company in case things

should continue to go downhill, they would probably refuse to risk throwing good money after bad, and the concern would straightway fail. But by permitting the directors and other insiders to safeguard themselves when advancing fresh capital, the law assists many struggling companies to weather financial storms, and this redounds to the benefit of everybody.

ILLINOIS STEEL CO. v. O'DONNELL, 156 Ill. 624 (1895). Three members of the board of the Joliet Enterprise Company, with one other person, composed the firm of Henry Fish & Sons. The Joliet Enterprise Company, although in fact insolvent, was a going concern doing a big business. Henry Fish & Sons loaned the company a large amount of money, which was secured by judgment notes. Judgment was entered and a levy made on the company's property. Other creditors of the Joliet Enterprise Company sued the assignee of Henry Fish & Sons to set aside the judgment notes as invalid, because obtained after insolvency. *Held*, as the notes were given for money newly loaned at the time in good faith to enable the company to carry on its business, they were valid.

WYMAN v. BOWMAN, 127 Fed. 257 (1904). Four directors of the Nebraska Fire Insurance Company loaned it money, which was used to pay its debts. The company was insolvent and assessments were soon afterwards made upon its stock. The four directors were credited with the payment of the assessments on their stock, and for the balance of their loan were given assignments of the certificates of assessment upon the shares of other stockholders. Wyman was made the company's receiver. He sued the four directors for the amount of their assessments, alleging that the credit given them was void as a preference over other creditors. *Held* that although, when the preference was given, the company's liabilities exceeded its assets, yet, as the cessation of business was not then apparently imminent, and as the preference was made in good faith, it must be allowed to stand.

163. The directors and officers of an insolvent corporation may prove their claims against it before any assignee

or auditor appointed to hear claims by a state court, or before a referee in bankruptcy appointed by a United States District Court. The claim of a director or officer is not set aside or postponed merely because of the claimant's connection with the insolvent concern.

BRISTOL MILLING & MANUFACTURING CO. *v.* PROBASCO, 64 Ind. 406 (1878). Probasco, a director of the Bristol Milling & Manufacturing Company, advanced money for its use, for which he received its promissory notes. Merritt was appointed receiver of the company, and Probasco brought suit on the notes. Merritt contended that Probasco's claim against the company should not stand upon the same footing and share ratably with the claims of other creditors, who were not stockholders or directors. *Held*, as Probasco was a *bona fide* creditor, there was no reason for such discrimination against him.

164. Of course, if a director or officer who claims to be a creditor of an insolvent corporation is indebted to the company, or if it has any valid counterclaim against him, he can receive a dividend only on the sum representing the excess, if any, of his claim against the company over and above its claim against him.

QUESTIONS

1. In your state, how many directors are necessary to make up a valid board?

2. Must a director be a stockholder?

3. Need directors of corporations chartered in your state be residents of your state?

4. The Ziegler Printing Company is in need of funds, and the stockholders have authorized the directors to mortgage all the company's property. Instead of calling a meeting of the directors, the secretary of the company calls on each of the seven directors separately and obtains their consent to the mortgage. The mortgage is then executed by the proper officers of the company and placed on record. At the next regular meeting of the board, a reso-

lution is passed disavowing the action of the directors. In a suit to cancel the mortgage, will the Ziegler Printing Company win or lose?

5. Has a director any more right to inspect the corporate books than an ordinary stockholder has?

6. What constitutes a quorum of the directors?

7. May board meetings be held outside the state creating the corporation?

8. Benson owned all the stock in the Arizona Mining Company. He elected two of his friends and himself directors of the company. At a board meeting at which were present Benson and two young men who held the proxies of the other two directors, he elected himself president of the company and his cousin, Bradford, secretary and treasurer. Benson died shortly afterwards and his representatives attempted to oust Bradford from his positions, contending he had not been validly elected. Is their contention good?

9. Is it necessary that a majority of the whole board should vote for a resolution in order to make it valid?

10. What are the duties of the board of directors?

11. May the board of directors make an assignment of all the property of an insolvent corporation for the benefit of its creditors?

12. Is notice to a single director of a matter affecting the company notice to the company? May the board of directors waive rights belonging to the company?

13. Is the president of a corporation elected by the directors or by the stockholders?

14. How are vacancies occurring in the board itself filled?

15. What two kinds of committees are there? May a board of directors delegate any of its authority to committees?

16. The Denver Electric Company, by resolution of its board of directors, agreed to issue to John King 500 shares of stock in payment for a patent belonging to King. The patent turned out to be worthless and, on the insolvency of the company, its receiver sued King for the par value of 500 shares of stock. Who wins?

17. Has the board of directors power to make calls on the capital stock? Has it power to declare dividends?

18. May the board of directors amend the charter of their company?

19. The board of directors of the Columbia River Salmon Company were in doubt as to whether or not a dividend should be declared. A meeting of stockholders was called and the financial condition of the company laid before it. The stockholders voted to declare a dividend. A week later the board met and, on second thought, decided not to declare the dividend. Johnson, a stockholder, sought to force the directors to declare and pay the dividend. Will he succeed?

20. What are generally the duties of directors?

21. The directors of the Clarksburg & Wheeling Railroad Company knew that it was the intention of the company to build a branch road to Charleston. Accordingly, they employed William Jenks to buy up a large tract of ground through which the new road was located and then, acting for the company, bought the land from Jenks at a big increase. This arrangement became known to the company's other officials, and suit was brought against Jenks to force him to pay the profits of his deal into the corporate treasury. Can Jenks be made to do so?

22. Why should not directors be expected to give their whole time to the direction of the affairs of the company?

23. Discuss the liability of directors to a corporation which has failed owing to the unwise management of the directors.

24. Is a director ever responsible for the misconduct of his fellow directors or subordinate officers of the company?

25. In your state, what is the liability of directors for declaring illegal dividends, for incurring indebtedness beyond the amount of the capital stock, and for failing to file annual reports?

26. Do directors receive compensation for their services?

27. Jones, a director of the Michigan Copper Mining Company, was employed by his company to survey a large tract of land. There were seven directors on the board, but at the meeting at which it was resolved to employ Jones only four were present. Jones's salary was fixed at \$300 per month. Three of the four directors, of which three Jones was one, voted for the resolution, and one director voted against it. Jones proceeded to survey the land, and then sued the company for his salary. What objection could the company make to paying this money and how would you decide the case?

28. The board of directors of the Syracuse Paper Company

consisted of nine members and that of the Maine Wood Pulp Lumber Company of five members, all of whom were directors of the former company. The paper company bought one thousand tons of wood pulp from the wood pulp company, to be delivered as called for in the course of a year. The price agreed on was very much less than the market value of wood pulp. A month later the Maine Wood Pulp Company sought to have the contract declared void. Will it succeed in so doing?

29. When directors have claims against their insolvent company, may they take steps to protect their own interest?

30. May a director buy the property of his company at a judicial sale?

31. Should directors be permitted to secure their loans to a company which is in danger of bankruptcy?

32. Do directors having claims against an insolvent company stand on the same footing with other creditors as regards receiving dividends on their claims out of the company's bankrupt estate?

CHAPTER X

THE PRESIDENT AND THE OTHER OFFICERS

(A) Qualifications and appointment

165. Almost every corporation has a chief executive officer who is usually called the president. Many corporations have also one or more vice presidents. Most companies have a secretary and a treasurer.

166. The qualifications of these officers and the method of appointing them are, in the case of most companies, regulated either by the statutes of the state where a given company has been chartered or by the company's own by-laws. See Section 56.

167. In the following states the president must be chosen from among the directors: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming; also in the District of Columbia and New Mexico. This requirement means not only that he must be a director, but also of course that he must have the qualifications necessary to become a director. See Chapter IX (A).

168. In the absence of a provision to the contrary, a vice president is usually required to have the same qualifications as the president of the company, for he may as a

rule be called on at any time to take the president's place. But in some companies, especially among those having several vice presidents, the requirements laid down for president differ from those laid down for vice president.

169. Ordinarily, the board of directors selects the president and the vice presidents, if any. But in Virginia this power is exercised by the stockholders themselves, except in the case of those companies whose charters or by-laws provide otherwise. In most of the other states where the directors ordinarily exercise such power, the regulations of a given company may reserve it to the stockholders.

170. As a rule no special qualifications are required of the secretary and the treasurer. This matter, like that of the appointment of the secretary and the treasurer, usually depends on the by-laws of each particular corporation. The directors of most companies are empowered by their by-laws to appoint these officers.

(B) Powers and duties

171. The powers and duties of the president and other officials are in many cases defined in the statute law, the by-laws or the resolutions passed by the directors. Generally an agent does not act validly if he goes beyond the powers granted to him. Outsiders dealing with a company through one of its officials cannot usually hold the company if its agent has exceeded his authority. See Sections 56 and 58.

172. Occasionally, however, even though an official oversteps his powers, the company may be bound by his acts if it has held him out as possessing more authority than he really enjoyed, or if it has subsequently ratified his unauthorized acts. See Sections 59 and 60.

173. An officer of a company is usually expected to look after its affairs personally, and to see that the company's

work is carried on properly. But he is not responsible for the shortcomings of his subordinates, provided he fulfills his own duty of supervision. Of course, if he finds that a subordinate is doing wrong, the officer should take prompt measures to set things right again.

174. The laws of many states impose penalties on the president and other officers for a failure to fulfill statutory obligations. Thus, some states require certain officers to make a yearly report of their company's condition, and set a penalty for noncompliance with this duty.

1. THE PRESIDENT

175. In almost every company the president is the chief executive officer. Ordinarily, it is for him to supervise the company's affairs, and to see that they are attended to properly. He is usually vested with broad powers of superintendence by the resolutions of the board, the by-laws, or the time-honored practice of the company.

176. It is generally the president's duty to keep the board of directors advised of important matters affecting the company. Most such matters are reported to the board at its regular meetings, but in case of emergency the president should call a special meeting if a delay until the board's next regular meeting may endanger the company's interests.

2. THE VICE PRESIDENT

177. The regulations of many companies provide that the vice president shall merely discharge the duties of the president when the latter is absent. In such companies the vice president has no regular duties and is ordinarily paid little or no salary. But some vice presidents are given charge of special branches of a company's business, to which they regularly devote much of their time. These officials

may usually also act for the president in the signing of stock certificates and similar matters.

178. Upon the death, retirement, or removal of the president, the vice president is usually allowed to take his place for the remainder of his unexpired term. Nevertheless, when the president's position becomes vacant, the directors in most cases are free to pass by the vice president and select some one else to fill the vacancy.

3. THE SECRETARY

179. In a broad sense, the secretary may be called the company's clerk. His duties, apart from those laid on him by statute and by-law, usually relate to the company's correspondence and to its records, especially the latter. In most companies the correspondence is carried on by a variety of officers and agents, but the secretary is the one who keeps or supervises the records. These records may include the company's charter and by-laws, the official minutes of the stockholders' and directors' meetings, deeds, leases, insurance policies, and similar documents belonging to the company, written contracts executed by it, as well as a multitude of letters, copies of letters and other papers. All these should be carefully preserved so that they will be accessible at any time.

180. The secretary of many companies is bound to keep minutes of the meetings of stockholders, directors, and board committees. He should attend such meetings and enter the proceedings carefully in a book kept for that purpose, signing his name at the end of the minutes of each meeting.

181. The secretary is also usually charged with the safe-keeping of the corporate seal. He imprints this seal on documents which are to be formally executed by the company. When not being used, the seal should be kept under lock and key, so that unauthorized persons will not be able to make improper use of it.

4. THE TREASURER

182. The treasurer of a corporation is usually the officer who takes charge of its funds and securities. He should be careful to have the bank account of the company entered in its name. Moreover, he should have the bank or trust company, in which the company's money is to be deposited, formally approved by the stockholders, through the adoption of a by-law, or by the board through the passage of a resolution.

183. The treasurer should keep accurate books of account, fully showing all receipts and disbursements of money. These he should be prepared to submit at any time to the inspection of the proper parties. The rules of most companies provide for the periodical auditing of the treasurer's accounts.

QUESTIONS

1. How are the qualifications of the officers of a corporation usually regulated?

2. In your state must the president be chosen from among the directors?

3. Why should a vice president have the same qualifications as a president?

4. Jones is the president of the Atlas Manufacturing Company. He is persuaded by a business friend to sign the name of the company on an accommodation note. This note is discounted by the Chicago Trust Company, which has knowledge that it is an accommodation note. On nonpayment of the note, the Chicago Trust Company sues the Atlas Manufacturing Company. Which wins?

5. The Martin Metal Company is engaged in the business of galvanizing iron. The regulations of the company expressly provide that the company shall not buy any iron already galvanized. After the business has run for several years, Martin, the president of the company, begins repeatedly to buy and sell galvanized iron in the company's name. This has gone on for several months, the Martin Metal Company always paying for the galvanized iron, when the

seller of the galvanized iron, a man named Jackson, is informed by some one unconnected with the metal company of the regulation aforesaid. Jackson continues to sell to the company, however, but finally the company refuses to pay for a carload of galvanized iron which it has received from Jackson, on the ground that the president had no authority to bind the company to pay for this iron and that Jackson had notice of this limitation on Martin's power to bind the company. In a suit by Jackson against the company, which wins?

6. When is a corporate officer liable for the misconduct of his subordinates?

7. What are the duties of the president?

8. When the president of a corporation dies, may the directors elect a new president or does the vice president become president?

9. What are generally the duties of the secretary of a corporation?

10. Who keeps the company's seal?

11. What are the duties of the treasurer?

12. What precaution should the treasurer observe in selecting a depository for the company's money?

PART FOUR

STOCKHOLDERS AND OTHER CORPORATE
MEMBERS

CHAPTER XI

MEMBERS OF NONSTOCK CORPORATIONS

184. The chief distinction between stock and nonstock corporations is, as the names imply, that the former, being organized primarily for the pecuniary profit of their members, have a capital stock, while the latter have not. The ordinary business corporation, organized for the financial betterment of its members, is the most familiar type of stock company. Religious, charitable, educational, social, and beneficial corporations are the best known kinds of nonstock corporations, which are to be found in all the states.

185. To show the varied scope of such concerns in some states, we may note that they include in Pennsylvania and many other states corporations organized for any one of the following purposes: The support of (1) public worship; (2) any benevolent, charitable, educational, or missionary undertaking; or (3) any literary, medical, or scientific undertaking, or a library association, or for the promotion of music, painting, or other fine arts; (4) the encouragement of agriculture and horticulture; (5) the maintenance of public and private parks, and of the facilities for skating, boating, trotting, and other innocent athletic sports, including clubs for each purpose and for the preservation of game and fish; the maintenance (6) of a club for social enjoyments, or (7) of a public or private cemetery; (8) the erection of halls for public or private

purposes; (9) the maintenance of a society for beneficial or protective purposes to its members from funds derived therein; (10) the support of fire engine, hook and ladder, hose or other companies for the control of fire; (11) the encouragement and protection of trade and commerce; (12) the formation and maintenance of military organizations; (13) the maintenance of a society for the improvement of the streets and public places in any city, borough, or town-ship; (14) for receiving and holding property, real and personal, of and for unincorporated religious, beneficial, charitable, educational, and missionary societies; (15) the prevention of cruelty to children and aged persons; (16) the execution of the trusts in connection with any gift to a city for establishing and maintaining any institution for the advancement of learning, science, music, or art.

(A) Admission of members

186. Membership in a nonstock corporation, like membership in a stock company, results from a contract between the corporation and the members. The fact of membership in a nonstock corporation is usually shown by a policy or certificate of membership, while membership in a stock company is evidenced by a certificate of stock. The qualifications for membership in nonstock corporations are usually laid down in the charter or by-laws. And the incorporators may generally prescribe such qualifications as they desire, provided they do not contravene some provision of the state or Federal Constitution and statutes or some principle of public policy. If nothing is said in the charter or by-laws as to the admission of members, the right of a nonstock corporation to provide for their admission will usually be implied.

187. No one can become a member of a nonstock corporation without the consent of the corporation, obtained by

complying with the terms and conditions upon which persons may be admitted to membership therein. Neither can one be compelled to become a member of such a corporation without his consent.

GARDNER v. HAMILTON MUTUAL INSURANCE CO., 33 N. Y. 421 (1865). By an act of the Massachusetts legislature three independent mutual insurance companies were incorporated into one under the name of the Hamilton Mutual Insurance Company. The act provided that it should "not affect the legal rights of any person," or take effect "until accepted by the members of said corporations respectively, at meetings called for that purpose." Hutchins, a member of the Bowditch Mutual Insurance Company, one of the old corporations, never assented to this act. His assignee, Gardner, sued the Hamilton Company on a policy issued to Hutchins by the Bowditch Insurance Company. *Held*, Gardner could not recover against the Hamilton Company. Hutchins had not assented to the act and there was, therefore, no privity of contract between him and the Hamilton Company. He was not made a member of the Hamilton Company by mere force of the act. He or his assignee, Gardner, must seek his remedy against the original corporation, the Bowditch Company.

(B) Expulsion of members

188. A stock company cannot take from a stockholder the property which is represented by his stock by expelling him from the corporation, even though all the other stockholders consent. But membership in nonstock companies being usually a matter of personal qualification, a member may so conduct himself as to cease to be a desirable member. In such cases, even where a man has been admitted to membership, he may be expelled when this is necessary for the interests of the corporation.

189. However, no member can be expelled unless he has been guilty of some offense which either (1) affects the good government of the corporation, or (2) is infamous or

indictable by the law of the land, except in cases where the charter or a statute confers upon the corporation power to expel members for other offenses. This power, however, must usually be conferred by charter or statute and is seldom valid when conferred merely by a by-law. Expulsion is not justified when the only complaint is founded on a private quarrel between members totally unconnected with the corporate affairs.

COMMONWEALTH v. BENEVOLENT SOCIETY, 2 Binney (Pa.) (1810). John Binns had accused William Duane, the president of the benevolent society, of certain ungenerous and improper conduct. Duane had Binns expelled on the ground that the society's charter gave authority to make by-laws, and that a by-law had been passed subjecting a member to expulsion for vilifying another. *Held* that Binns should be restored to membership; for without an express power in the charter or statute law nobody can be expelled unless he has been guilty of some offense, which is either (1) infamous or indictable, or (2) a direct violation of his duty as a corporator.

(C) Rights and liabilities of members of nonstock corporations

190. Most nonstock corporations are formed for the advantage of their members in a social, charitable, educational, religious, or financial way. Others are purely charitable and are intended solely for the benefit of outsiders. The benefits and privileges enjoyed by members as well as the liabilities which they incur may, in most cases, be learned from the constitution and by-laws of each corporation.

191. Members are expected to conform to the requirements of the charter and of all reasonable by-laws and regulations, and if trouble arises, the courts are not much disposed to interfere with the domestic management of these nonstock concerns. A member may, however, obtain judicial relief where his rights have been clearly infringed. But before applying to the courts, he should first exhaust

all reasonable means of obtaining justice within the corporation itself.

QUESTIONS

1. What is the chief distinction between stock and nonstock corporations?

2. Name some of the purposes for which nonstock corporations may be organized.

3. What is the evidence of membership in nonstock corporations?

4. Who prescribe the qualifications for membership in these corporations?

5. Can a member of an incorporated social club be expelled merely because the rest of the members do not want him?

6. The Roselle Lodge passed a by-law making anyone who should drink intoxicating liquors at any time or in any place liable to expulsion. Johnson was proved to have taken beer with his lunch, and by vote of the lodge was expelled. He applied to a court for an order reinstating him. Should the order be made?

7. What must a member of a nonstock corporation whose rights have been clearly infringed by the corporation, do before a court will grant him relief?

CHAPTER XII

SUBSCRIPTIONS TO STOCK IN CORPORATIONS

192. Technically, a subscription is the act by which a person agrees in writing, over his signature, to furnish a sum of money or certain property for a particular purpose. But the word is often applied to oral as well as to written agreements of this sort. A subscription to stock in a corporation involves a promise to take a certain number of shares of its capital stock.

193. A stock subscription, properly speaking, refers to the taking of shares out of the original issue of corporate stock; that is, to the furnishing of funds to the corporation itself in exchange for a certain fractional proprietary interest therein. It should be distinguished from an agreement to buy shares already issued, the purchase to be made from one who is already a stockholder. Indeed, if a corporation issues shares to a party, but later acquires them from that party and disposes of them to a second party, the latter's agreement to take them is not really a subscription. The purchase of shares already issued is like the purchase of many other articles of personal property. See Chapter XX (A) 3.

194. Another distinction should be drawn between subscribing for shares in a company not yet chartered and subscribing for shares in an existing company. The former kind of subscription presents certain problems which require special treatment.

(A) Subscriptions to stock in a company not yet chartered

195. What is the nature of an agreement to take stock in a corporation which is to be organized in the future? It is not a present contract with such corporation, because a contract needs at least two contracting parties, and the corporation is not yet in existence. It is seldom, if ever, a contract among the various subscribers to take stock in the future company, so as to enable one defaulting subscriber to be held liable thereunder at the suit of the others. The best view is that such subscription involves a continuing offer made by the subscriber, which, unless lapsed or withdrawn, may be accepted by the corporation upon its coming into existence.

196. This continuing offer, like any other offer, may ordinarily be withdrawn until the moment it is accepted. Indeed, it has been decided by some courts that if a subscriber dies or becomes insane, he can no longer be regarded as continuing to make such offer, which is accordingly revoked by his death or insanity.

HUDSON REAL ESTATE CO. v. TOWER, 156 Mass. 82 (1892). Tower subscribed to the capital stock of a corporation to be formed under the name of the Hudson Real Estate Company. Later he withdrew his subscription. Then the corporation was formed and sued Tower to recover the amount of his subscription. *Held*, the company could not recover.

MUNCY TRACTION ENGINE CO. v. GREEN, 143 Pa. 269 (1888). Green subscribed to the capital stock of a concern to be incorporated as the Muncy Traction Engine Company. He was present at several meetings of the subscribers; but before the application for the charter was prepared he withdrew his subscription. The charter was granted and the company sued to recover Green's subscription. *Held*, there was nothing to prevent Green from withdrawing from the enterprise at the time he did. Green won.

SEDALIA, WARSAW & SOUTHERN RY. CO. v. WILKERSON, 83 Mo. 235 (1884). George Smith subscribed to the capital stock of a proposed corporation to be known as the Sedalia, Warsaw and Southern Railway Company. Later Smith died. The company was organized, accepted the subscriptions to its stock, and to secure payment of Smith's subscription sued Wilkerson, who was Smith's administrator. *Held* that the subscription could not be enforced against Smith's estate, he having died before the company was chartered.

197. The precise moment when acceptance of such offer is deemed to be made varies in the various states. Some states hold that until the corporation has been chartered and has formally accepted a subscription, it may be revoked. In other states it is held that no such formality is needed to fix a subscriber's liability. Thus, in Pennsylvania it has been decided that when once the application for a charter is ready to be filed, the preliminary steps having been taken, no subscriber can thereafter withdraw.

198. Under the laws of some states a subscription made in compliance with statutory formalities is binding and irrevocable, even though the corporation is not yet chartered. This rule is at variance with the ordinary principles of contract law, but rests upon the legislative power which, in such states, has recast the law to prevent a withdrawal of subscriptions. This rule is laid down in most states where commissioners to receive subscriptions are appointed under statutory authority. See Appendix A.

199. The following is a form of subscription list which may be used in the case of a corporation not yet chartered. Care should be used to have subscribers definitely express in writing their willingness to take shares. The residence of the subscribers, the number of shares subscribed for by each and the amount to be paid therefor should appear in this subscription list. In addition, as is seen in the following form, the other essentials of a valid contract should also be present.

SUBSCRIPTION LIST

CENTRAL LEATHER COMPANY

To be chartered under the laws of Illinois

With a capital stock of \$1,000,000

Divided into 20,000 shares of the par value of \$50 each

We, the undersigned, hereby severally agree to take the number of shares of stock in the Central Leather Company set opposite to our respective names, and agree to pay cash therefor, when and as called upon by the said company after it is chartered, up to but not exceeding the par value of the shares by us respectively subscribed. It is understood that the said Central Leather Company is to be incorporated for the purpose of manufacturing and dealing in leather and imitation leather goods.

In witness and confirmation whereof, we have hereunto set our hands and seals at Chicago, Ill., this twelfth day of September, A. D. 1910.

| Name | Residence | Num- ber | Subscrip- tion |
|----------------------------|-------------------------------|-------------|-------------------|
| (Signed) Walter Lee (Seal) | 89 E. High St., Chicago, Ill. | 10 | \$500 |
| " James Casey " | 725 Pine St., Chicago, Ill. | 60 | 3,000 |
| " Ada Colt " | 67 New St., Gary, Ind. | 2 | 100 |
| " Leo Fort " | 273 Race St., Joliet, Ill. | 45 | 2,250 |

(B) Subscriptions to stock in a company already chartered

200. An agreement to take stock in an existing corporation is on the same footing with most other agreements. As a rule, no problem peculiar to corporations is presented, for the matter is purely one of contract law.

201. In most states, contracts to sell goods and merchandise must be put in writing where the amount involved is over a certain minimum. See "American Business Law," Section 154. Some of these states extend the requirement of writing to contracts for the sale of corporate stock.

TISDALE v. HARRIS, 20 Pick. (Mass.) 9 (1838). Tisdale sued Harris to recover on an agreement by Harris to sell Tisdale two hundred shares of stock in the Collins Manufacturing Company. Harris claimed that the agreement was within the statute providing that contracts for the sale of "goods, wares, or merchandise" for the price of \$50 or more must be in writing. *Held*, contracts for the sale of stocks of corporations are within the statute, and Tisdale could not recover without proof of a written memorandum of the sale, unless the contract had been partially performed. Harris won.

202. But even in states where a subscription by word of mouth is legally binding, it is customary, nevertheless, to get those subscribing for stock to sign an agreement to take it. This is wise in view of the fact that many persons who agree to take stock in a company soon afterwards regret what they have done and try to avoid liability. Some of these persons go so far as to deny altogether that they have agreed to take any stock. Now, if they have not committed themselves in black and white, they may render it difficult for the company to hold them, because it is much easier for a dishonest subscriber to escape, or at least to postpone the entry of judgment against him, if he has never signed a paper agreeing to take stock.

203. On page 133 is a form of subscription contract which may be used in the case of a corporation already chartered. Some of the clauses in this form may, if desired, be inserted in the form shown under Section 199.

(C) Conditional subscriptions to stock

204. Many subscriptions are procured through the solicitations of promoters or of canvassing agents in the service of promoters. Some subscribers do not readily yield to the persuasion of these missionaries, but agree to take stock subject to certain conditions. How far are these conditions valid, first, as against the corporation itself; second,

APPLICATION FOR SHARES

ACME SIGN COMPANY

1126 Rose Avenue, St. Louis, Missouri.

I hereby apply for seventy shares of the preferred capital stock of Acme Sign Company, a corporation chartered under Missouri laws, with an authorized capital of five hundred thousand dollars (\$500,000) divided into five thousand shares of common stock and five thousand shares of preferred stock, all of the par value of fifty dollars (\$50) per share.

I understand that Acme Sign Company is at liberty to reject this application outright or to allot me any less number of shares than that for which this application is made, and that, if my application is rejected, they are to return my check herewith enclosed. In the event of my being allotted any shares, I hereby agree to pay for same as follows: ten per cent of the par value thereof at once, as per check herewith enclosed; fifteen per cent within thirty days after receiving notice of the said allotment; twenty-five per cent within three months after receiving said notice; and the balance of fifty per cent within one year after receiving said notice.

When the final installment of the purchase money shall have been paid, I am to receive a stock certificate for the said shares, and I am free to anticipate the payment of the sums due as above, in order the sooner to receive the said stock certificate, but without any discount for payment ahead of time.

I make the foregoing subscription unconditionally and hereby expressly state that Acme Sign Company is not to be held responsible for any representations or promises made to me by any agent thereof.

In witness and confirmation whereof I have hereunto set my hand and seal this thirteenth day of September, A.D. 1910.

(Signed) GEORGE MERCER (SEAL).

as against its creditors in the event of its becoming insolvent?

205. The application shown in Section 203 expressly relieves the corporation from liability for statements made by its agents to the subscriber, and declares that it is unconditional. Even though no such express disclaimer of conditions appears in a subscription, the courts often refuse to recognize stipulations which are not made part of the subscription itself. It would open the door to fraud, if the courts should encourage persons signing apparently absolute subscriptions to hedge them about with secret qualifications.

206. Even when a subscription is made expressly subject to a certain condition, the subscriber is sometimes unable to avail himself of the condition. Thus, in some states, a subscription contingent upon the obtaining of a certain number of other subscriptions has been held enforceable in favor of the company's creditors, although the condition remains unfulfilled. And various other conditions, contrary either to public policy or to the statutes regulating a given corporation, have been held invalid.

MORROW *v.* IRON & STEEL Co., 87 Tenn. 262 (1888). Morrow subscribed to the stock of the Nashville Iron, Steel and Charcoal Company on the stipulation that he should receive bonds of the corporation to the full amount of stock subscribed, secured by first mortgage on its property. The corporation repudiated the stipulation and Morrow brought suit to be relieved from his subscription. *Held* that the stipulation was illegal and void as against public policy, but Morrow was not released from liability on his subscription.

PITTSBURG & STEUBENVILLE R. R. Co. *v.* BIGGAR, 34 Pa. 455 (1859). Biggar subscribed to the stock of the railroad company through the commissioners, as required by statute, upon condition that the road should be located on a specified route. The company sued to recover the subscription. Biggar contended that the con-

dition had not been complied with. *Held*, the commissioners had no power to receive conditional subscriptions. The condition was illegal, but the subscription was absolutely binding. Biggar lost.

207. Not only should the conditions, if any, be clearly expressed in the original subscription, but they should be referred to in any subsequent acknowledgment of his obligation which the subscriber may make. In many cases where a condition was originally binding on the company, it is waived by the subscriber's failure to insist on it. Thus, if a subscription was originally made for shares in a corporation to be organized for certain purposes and with a certain amount of capital, but the concern is finally chartered with somewhat different purposes and a different amount of capital, the subscriber may refuse to recognize any liability. Nevertheless, if, knowing all the facts, he participates in the affairs of the new company, he thereby abandons his right to repudiate the contract, and shows a willingness to be bound despite the change in the promoters' plans.

WOODS MOTOR VEHICLE CO. *v.* BRADY, 181 N. Y. 145 (1905). Brady subscribed to stock in a corporation "to be organized for the purpose of dealing in automobiles and motor vehicles." A company was subsequently organized for the purpose of "manufacturing, leasing, purchasing, and selling all kinds of automobiles, motor vehicles, and other vehicles." It demanded payment by Brady of his subscription. He refused to pay on the ground that the element of manufacturing materially changed the character and risks of the business and discharged such subscribers as did not assent to it. The company sued to recover Brady's subscription. *Held*, the material departure from the company's original purposes released Brady.

NICKUM *v.* BURCKHARDT, 30 Ore. 464 (1897). Nickum, as receiver of the Oregon Fertilizing Company, sued Burckhardt Brothers to recover an amount claimed to be due on an alleged subscription to the capital stock of the said company. The defend-

ants contended that the purposes designated in the articles of incorporation failed to correspond with those set forth in the subscription agreement and that, therefore, the subscribers were not liable. It was shown that the subscribers had participated in the organization under the articles of incorporation. *Held*, the subscribers must be considered to have assented to the departure from the original plan, and were liable.

McCONNAGHY *v.* MONTICELLO CONST. CO., 117 S. W. (Ky.) 372 (1909). The subscriptions to the stock of the Monticello Construction Company were made on the condition that they were not to be binding unless a specified sum should be subscribed in good faith. The subscribers met, passed on the question of the amount of *bona fide* subscriptions, and proceeded to organize the corporation. They elected as treasurer and director McConnaghy, a subscriber who was present at the meeting and who acquiesced in the action taken. He acted as director for over a month, without objection that the necessary amount of stock had not been subscribed in good faith. Later the company sued him to recover his subscription. He contended that it was not binding because the condition as to the amount of *bona fide* subscriptions had not been fulfilled. *Held* his conduct necessarily led his associates to believe that he had consented to the subscriptions as satisfying the condition, and the company could recover.

(D) Subscriptions induced by fraud

208. A subscriber who has been led to take shares through fraudulent representations made by the company's agents is usually free to repudiate liability if he acts promptly upon discovering the fraud. But if he goes ahead under the contract after learning all the facts, he is, as a rule, held to have waived his right to disaffirm.

KRISCH *v.* INTER-STATE FISHERIES CO., 39 Wash. 381 (1905). Krisch was induced to purchase stock in the Inter-State Fisheries Company through the representations of its treasurer as to its assets, debts, and business. Under arrangements made with the

same officer, Krisch entered the company's service. Part of his compensation was to be paid in stock. At the end of three months Krisch discovered that the stock was worthless and that the treasurer's representations were false. He sued the company. *Held*, that he had not waived his right to repudiate the contract by failing to discover the fraud during three months' service with the corporation since the information was not open to him, but was hidden by the company whose chief business was to make fraudulent sales of its own stock.

BARROWS v. NATCHAUG SILK Co., 72 Conn. 658 (1900). Chauncey Bevin presented a claim to the receiver of the Natchaug Silk Company for the amount he had paid the corporation on his subscription for certain shares of its stock. He asserted that he had been induced to take the shares by fraud. The court found that for about six years Bevin had attended meetings of stockholders and each year received dividends on his stock. *Held*, as Bevin had the means of knowing that the representations were fraudulent and did not act promptly in rescinding his contract, he was bound thereby.

ACETYLENE LIGHT, HEAT & POWER Co. v. SMITH, 10 Pa. Super. Ct. 61 (1899). Smith was sued on his subscription to the stock of the Acetylene Light, Heat and Power Company. He set up the defense that the subscription had been procured by fraud. It was proved that Smith had notice of the alleged fraud in September, 1896, but gave no notice of an intention to rescind and even paid an installment on his subscription. He raised no question until October, 1897. *Held*, that Smith, having taken the chance of a rise in the market price of a highly speculative stock for a year, must abide by his own choice to live up to his contract.

209. False representations as to existing facts, which constitute fraud, must be distinguished from misrepresentations as to what will happen in the future and from misrepresentations as to matters of law. Statements as to future events have in most cases little or no effect on a subscriber's liability, unless he brings them into the con-

tract, as by making his subscription contingent upon their being found correct. See Section 205. Misrepresentations as to matters of law are seldom enough to upset a subscription, for the subscriber is supposed to learn the law for himself, a knowledge of it being usually accessible to all.

SHATTUCK v. ROBBINS, 68 N. H. 565 (1896). Towner, soliciting subscriptions to the stock of the New Hampshire Press Association, represented that they had arranged to buy a paper called the "Nashua Telegraph" and were going to have Associated Press news. Robbins was induced to subscribe by this statement. The corporation when afterwards organized did not buy the "Nashua Telegraph" or get Associated Press reports. Suit was brought to recover Robbins's subscription. He claimed it had been obtained by false representations. The court found no facts inconsistent with the utmost good faith on Towner's part. *Held* that as Towner's statement regarding the "Nashua Telegraph" was merely an expression of opinion, and as the statement regarding the Associated Press news related to the happening of a future event, the corporation could recover from Robbins the amount of his subscription.

UPTON v. TRIBILCOCK, 91 U. S. 45 (1875). Upton, as assignee of the Great Western Insurance Company, sued Tribilcock, alleging that Tribilcock was a stockholder of the said corporation and that only twenty per cent had been paid upon his stock. Tribilcock claimed that the subscription had been obtained by the fraudulent representation of the company's agent to the effect that Tribilcock would be responsible for only twenty per cent of his subscription. *Held*, as the misrepresentation was one of law it would not vitiate the contract, or constitute a defense in this action to enforce payment of the entire amount subscribed.

210. Again, in order to repudiate a subscription on the ground of fraud, one ordinarily should prove that the fraud was committed by the company's authorized agent. Thus, if a stockholder of a company, not being empowered to solicit subscriptions, induces an outsider to take stock by

false statements as to the company's condition, the victim is usually held bound. The company was no party to the fraud, and the subscriber has only himself to blame for believing the person who deceived him. Of course, the guilty party is personally liable to pay whatever damage results from his deception.

CANAL BANK *v.* HOLLAND, 5 La. Ann. 363 (1850). Holland was induced to subscribe to the stock of the Mexican Gulf Railway Company. He gave his note for the price of the stock. In the course of negotiation the note came into the Canal Bank's possession. The bank sued Holland, who claimed that the subscription was obtained through the false representations of the company's agent. It was proved that the representations were made merely by a stockholder who was not the company's authorized agent. *Held*, the representations did not bind the corporation, and Holland was liable for the amount of his subscription.

211. A misrepresentation as to unimportant collateral matters is seldom sufficient to destroy the validity of a subscription. The courts recognize that if a company does not win success, its subscribers may be quick to seize at every straw in order to escape liability. Hence, a misstatement made to a subscriber before he agrees to take stock should be material, or the contract will usually be enforced in spite of it.

HASKELL *v.* WORTHINGTON, 94 Mo. 560 (1887). Haskell, as assignee of the Missouri Cotton-Seed Oil Company of St. Louis, sued Worthington on the latter's subscription made by him to the company's capital stock. Worthington contended that he was induced to subscribe by the false representation that certain of his neighbors and friends had agreed to take stock in the corporation. *Held*, such a representation was immaterial and no defense to an action on the stock subscription.

SELMA, MARION & MEMPHIS R. R. Co. *v.* ANDERSON, 51 Miss. 829 (1876). A railroad corporation sued Anderson on his subscrip-

tion to its capital stock. Anderson contended that his subscription was not binding, since it had been induced by the false representation of the company's president as to its pecuniary condition and prospects. *Held*, such representation would not avoid a subscription unless it was clear that the condition of the enterprise constituted a material inducement to Anderson's subscription.

QUESTIONS

1. Define a subscription.

2. Is there any difference between subscribing for shares in a corporation not yet formed and buying shares from a stockholder in a company already formed?

3. Moore subscribed for stock in the Brown-Holtz Company which was soon to be formed. After his subscription and before the company was formed, he became insane. The company, when formed, sued to collect the subscription? Can the company force payment of the subscription?

4. Need a subscription to stock in a corporation be in writing?

5. Why is it always best to have subscriptions in writing?

6. What is a conditional subscription to stock?

7. White subscribed for twenty shares of the capital stock of the Atsion Consolidated Water Company on the express condition that before he should be called on to pay up his subscription, three hundred shares of the company's stock must be unconditionally subscribed for in good faith. Shortly after the company started business it failed. Suit was brought by the receiver of the company to collect White's subscription. White set up as a defense the fact that three hundred shares of stock had not been subscribed, as was required in his subscription. Who wins?

8. How may a subscriber waive the right to insist on a condition subject to which his subscription was made?

9. The prospectus of the Cumberland Coal Transportation Company stated that the company had been granted the right of eminent domain. On the faith of this assertion, Paul subscribed for ten shares of the company's stock. At the meeting for the organization of the company, which Paul attended, he learned that the company had not been granted the right of eminent domain. Nevertheless he took part in the meeting, was elected a director,

and served for three weeks. Then he repudiated his subscription. For whom would you give judgment in a suit to collect the subscription?

10. Will a false representation as to what will happen in the future avoid a subscription induced by such representation?

11. Is the fact that a stockholder represented that a number of the friends of one about to subscribe for stock had already subscribed, sufficient to avoid the subscription, the representation being false?

CHAPTER XIII

TRANSFER OF MEMBERSHIP IN A CORPORATION

212. Stock in a corporation is a species of personal property and the right to transfer it is an incident to ownership in it. Stock, however, being of an intangible nature is not, like many other kinds of personal property, (such as horses, cash, etc.), capable of transfer by manual delivery. The steps to be taken in the transfer of stock are usually provided for by statute or in the corporate charter or by-laws. These provisions are generally much the same everywhere.

213. Ownership of shares of stock is evidenced by a certificate. See Section 228. On the back of most certificates is printed a form of assignment and power of attorney authorizing a transfer, as is shown on page 143.

214. When the registered owner of stock wishes to transfer it to another, he puts his signature at the bottom of the form above given (or signs a detached power of attorney like that shown in Section 220), and delivers the certificate to the transferee. Ordinarily the power of attorney is not completely filled out, but if desired various data can be inserted in the blank spaces. In the eye of the law, the registered owner has now divested himself of the evidence of his ownership, and has empowered the transferee to become a member of the corporation as respects the shares represented by the certificate.

215. This constitutes the first step, and, as between the transferor and the transferee, the assignment is complete.

NOTICE. THE SIGNATURE OF THIS ASSIGNMENT MUST CORRESPOND
WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY
PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATSOEVER

For Value Received, I, hereby sell, assign, and transfer

unto
Shares of the Capital Stock, represented by the within
Certificate; and, do hereby irrevocably constitute and appoint
Attorney
to transfer the said Stock, on the books of the within named
Company, with full power of substitution, in the premises.

Dated September 6, 1910
In presence of

James Casey George Byrne

FORM OF ASSIGNMENT AND POWER OF ATTORNEY AUTHORIZING A TRANSFER

In this condition the certificate may pass from hand to hand by mere delivery without further indorsement. But as between the transferee and the corporation, the transfer is merely executory. As yet the transferee is not a member of the corporation. Perhaps he may not be allowed to vote the shares at corporate meetings, and notices to stockholders are not sent to him, for he is not on the official list. In order to complete the assignment, therefore, he must see that the power of attorney signed by the registered owner is duly acted upon. He may insert his name in the proper blank space in the power of attorney to show who shall be the transferee.

216. The certificate, with a power of attorney indorsed thereon or appearing on a document delivered therewith, is surrendered to the corporation which originally issued it. The corporation cancels it, and issues instead a new certificate for the same number of shares made out in the transferee's name.

217. Sometimes a certificate represents more shares than the number meant to be transferred, in which case a new certificate is made out in the transferee's name for the number of shares he is to get, and another new certificate is made out in the transferor's name for the number he is to keep. For example, suppose Jones owns forty shares of the Rubberoid Company which he acquired at two different times and which are evidenced by two certificates for twenty shares each. Suppose Jones agrees to sell thirty shares to Smith. Both Jones's certificates are surrendered to the Rubberoid Company with proper powers of attorney signed by Jones. The company cancels these two certificates, and issues a new certificate for thirty shares to Smith and one for ten shares to Jones. Of course, if Jones had sold Smith only twenty shares, he would have delivered only one of his two old certificates.

218. Most corporations require a receipt to be given for every new certificate. This is usually done by the transferee's signing a receipt on the stub from which the new certificate has been detached. If it is inconvenient for the transferee to sign the receipt, he may appoint an agent to do so for him. The assignment is then complete.

219. Sometimes a transfer of shares is made for the purpose of securing a loan, or other debt. This kind of transfer is called a pledge of stock, and the transferee holds the stock subject to the payment of the debt. When such an assignment is made, the better practice is for the transferor not to sign the blank power of attorney[†] indorsed on the certificate, but to execute a power on a separate sheet of paper. Pending the maturity of the loan, the power of attorney is seldom acted upon. The lender usually holds the certificate, with the accompanying power of attorney, but the shares still stand registered in the name of the borrower, who usually continues to vote them and to receive whatever dividends may be paid on them. But if the borrower defaults in the performance of his agreement, the lender then proceeds, if he thinks fit, to have the shares sold and transferred. Of course, in the majority of instances the borrower lives up to his agreement, and when he pays the debt which was secured, the power of attorney may be destroyed, and the certificate is returned to him in its original condition.

220. On page 147 is a form of detached power of attorney which is referred to in the preceding section. One of these may, as a rule, be used by a stockholder in connection with a number of different certificates, each representing shares owned by him in the same company. But if some shares stand in his name spelled out in full—say, Frederick Walter Holmes—and some in the name of Frederick W. Holmes, he should execute two powers of attorney and sign them to correspond with the stock certificates.

221. In an active stock market it often happens that a purchaser of shares intends to dispose of them shortly, and so never takes the trouble of having them registered in his name. When he sells them again he simply delivers the certificate still standing in the former owner's name, together with a power of attorney signed by the former owner, and no trace of his intervening ownership ever appears on the company's books. Perhaps the new purchaser may do likewise. This process may be repeated until finally some purchaser, desiring to be known as owner of the stock, delivers the certificate with the power of attorney to the corporation, and has a new certificate issued in his own name.

222. Sometimes, too, a purchaser omits to have shares, to which liability attaches, put in his own name lest disaster overtake the company and he be called on to pay an assessment. He may want to hold the shares still registered in the former owner's name, pending a possible rise in their market value. If the registered holder who has disposed of them to this speculator learns that no transfer has been put through, he may, in some states, bring suit to compel the new owner to acknowledge himself as such.

223. In a number of states*statutes provide that every corporation shall maintain a stockholders' book. This book contains an indexed list of all the stockholders, the number of shares held by each, and the serial number of the stock certificate covering such shares. It is frequently provided by statute, or in the charter or by-laws, that transfers of stock shall be made only on this stockholders' book. As to the effect of such a provision on the transfer of stock, the authorities do not agree. In a number of jurisdictions it has been held that, until the new certificate has either been registered or deposited for registration, no transfer can be effected. Meantime, the legal title remains

KNOW ALL MEN BY THESE PRESENTS, That _____
I, Gilbert Ramsay,

for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign and transfer unto _____
William S. Lindsay

Fifty (50)

shares of the preferred STOCK of the Empire Brass Works

standing in my name on the books of the Empire Brass Works

and do hereby constitute and appoint _____

my true and lawful Attorney, irrevocable, for me and in my name and stead, but to _____ use, to sell, assign, transfer and set over all or any part of the said Stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said Attorney, or his substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand
and seal the 28th day of September 19 10

SEALED AND DELIVERED

IN THE PRESENCE OF

(Signed) GEORGE BALFE

(Signed) GILBERT RAMSAY SEAL

DETACHED POWER OF ATTORNEY FOR THE SALE OF SHARES

in the transferor, while the transferee has merely an equitable title. From this view it follows, that anyone dealing with the transferor, in ignorance of the transferee's equitable title, has priority over him. But many states, notably Alabama, Georgia, Kansas, Louisiana, Michigan, Minnesota, New Hampshire, New Jersey, New York, and Pennsylvania, hold that registration is merely for the benefit and convenience of the corporation, and that as to third parties the transfer is complete without it.

FORT MADISON LUMBER CO. v. BATAVIAN BANK, 71 Ia. 270 (1887). Weston was the registered owner of certain shares of stock of the Fort Madison Lumber Company. In 1883 he borrowed money from the Batavian Bank, to which he pledged the stock as security for the repayment of the loan. The transfer was never registered as required by the Iowa Code. Weston subsequently became indebted to the firm of Hammel & Company, the Neillsville Bank, and the Clark County Bank, all of which recovered judgment against him and issued execution on the stock registered in his name. None of the attaching creditors knew of the pledge to the Batavian Bank. The Fort Madison Lumber Company filed a bill in equity to determine who owned the stock. *Held*, a transfer of corporate stock is not valid as against the transferor's attaching creditors without notice thereof, unless it has been registered on the company's books. The stock was therefore subject to execution for Weston's debts; and the Batavian Bank lost.

224. Where a power of attorney is forged, a transferee who acquires it, together with a genuine stock certificate, from the wrongdoer, gets no title against the true owner. If the corporation recognizes the transfer and issues a new certificate to the transferee, the true owner may, by bill in equity, compel the corporation to replace it, or may sue to recover its value, unless he has participated in the fraud.

TELEGRAPH CO. v. DAVENPORT, 97 U. S. 369 (1878). Rickey was the custodian of certificates of stock which Henry and Katharine Davenport owned in the telegraph company. He forged their

names to the blank power of attorney indorsed on the certificates and thereby obtained a transfer of the stock on the company's books. When the forgery was discovered, Henry and Katharine Davenport sued to compel the corporation to replace the stock on the books in their names, to issue certificates to them and to pay them the dividends declared on the stock after the transfer. *Held*, the plaintiffs were entitled to the relief prayed for.

225. A company may, under certain circumstances, refuse to recognize an attempted stock transfer. Thus, if the company has a lien on the stock for a claim against the transferor, or if the transferee refuses to deliver up the old certificate, or if the company has reason to believe that the power of attorney is forged, or executed without authority, it may decline to issue a new certificate.

226. Where, however, there is no cause for a refusal, the transferee may (1) file a bill in equity to compel the company to issue a new certificate to him and to do whatever else may be needed to complete the transfer, or (2) sue to recover damages, in some states, for the value of the shares at the time of the refusal, or, in other states, for the value of the shares at the highest market price between the refusal and the commencement of the suit.

227. Generally speaking, the effect of a transfer is to substitute the transferee in the transferor's place. When a valid transfer has once been executed, the transferee is entitled to vote at corporate meetings and to share in dividends. The liability of the transferor and the transferee to creditors of the corporation is treated in Chapter XX (A).

228. On page 150 the form of stock certificate shows that George Byrne owns seventy-five shares of the common capital stock of The Empire Brass Works. To the left of the certificate, which is surrounded by a decorated border, appears the stub of the corporation's stock certificate book from which Byrne's certificate is detached.

Certificate
 No. 623
 For seven and one-half Shares
 of the
 Empire Brass Works
 63 Duane Street, New York
 Dated Jan. 2, 1910
 Truly and lawfully
 attested this 1st day of
 January 1910
 Attest: My hand and the seal of the
 Company this 1st day of January 1910
 George Burne



CERTIFICATE OF COMMON STOCK

229. The stock certificate given on page 151 shows that Gilbert Ramsay owns fifty shares of the preferred stock of The Empire Brass Works. The certificate shows what preferences holders of this kind of stock enjoy over the common stockholders.

QUESTIONS

1. What is corporate stock? Is stock the same thing as a stock certificate?

2. Describe fully the process of sale and transfer on the company's books of corporate stock, explaining each step.

3. Jackson sold Quinn twenty shares in the Reno Producing Company. Quinn neglected to have the shares put in his name and the company, having declared a dividend, paid the amount due on Quinn's shares to their former owner, Jackson. Quinn then sued the company to force it to pay him the dividend on his shares. Which wins?

4. What is done when the holder of stock sells only a part of the shares represented by his certificate?

5. When stock is pledged to secure a loan, why is it best to sign a separate power of attorney to be delivered to the pledgee with the stock, rather than the one indorsed on the back of the certificate?

6. State some reasons why a purchaser of stock may want to have it put in his name on the books of the company, and other reasons why he may desire it to remain standing in the name of the former owner.

7. In your state what is the effect of a provision that stock is to be transferred only on the books of the corporation?

8. Brown stole a certificate representing ten shares of the Union Pacific Railroad Company's stock, standing in the name of Henry Ross. Brown forged Ross's name to the power of attorney on the back and sold the stock to Snow, who had it transferred on the books of the company. Ross sued the railroad company to force it to reissue to him a certificate for the stock and to recognize him as the holder of ten shares of its stock. Will Ross succeed in his suit?

9. When may a company refuse to recognize an assignment of its stock?

10. What are the remedies of the purchaser of stock against the corporation in case the latter wrongfully refuses to recognize the purchaser as a stockholder?

CHAPTER XIV

VOTING POWERS OF STOCKHOLDERS

(A) The right to vote

230. The right of a stockholder to have a voice in the management of his corporation is exercised through his voting power. The right to vote at corporate meetings is an incident to the ownership of stock, whether it be common, preferred, or some other kind of stock. This right may be, but seldom is, denied by statute, and in a few states by a provision in a company's charter. Its exercise may be regulated through the by-laws, and if such by-laws are reasonable and do not substantially impair the right, they are binding on the stockholders.

231. At the common law each stockholder had but one vote. Now almost everywhere a stockholder has a vote for each share of stock which he owns. But the legislatures of several states, in order to prevent the control of a corporation from getting into the hands of a few stockholders, have placed a limit to the number of votes that each stockholder may cast. For example, in Iowa each stockholder is restricted to vote a maximum of one tenth of the outstanding shares. And under a few charters, each stockholder has one vote for each share of stock until he shall have cast ten votes, and after that one vote for every two shares of stock, and so on in a decreasing scale. Attempts of stockholders to evade such provisions, by conveying their surplus stock to third parties for voting purposes,

have been declared void as tending to defeat the purpose of these statutes.

232. In order to give the minority stockholders a chance to elect a representative to the board of directors, statutes in many states authorize "cumulative voting." In other words, at an election of directors each stockholder is given the right to cast as many votes as he has shares of stock multiplied by the number of directors to be elected. The right of cumulative voting is dependent entirely upon legislative authority. In Illinois, Pennsylvania, and a few other states it is expressly provided for by statute, while in Delaware, New Jersey, New York, and several other states it is authorized, if expressly provided for in a company's articles of association or by-laws.

1.—WHO IS ENTITLED TO VOTE

233. As a general rule, the owner of stock at the time a vote is to be cast is the person entitled to vote it. Occasionally disputes arise between parties to a transfer of stock, or between the legal holder and the beneficial owner of stock, as to who may vote it at a stockholders' meeting. Ordinarily the registered owner has the right to vote; and the judges of election, in case of dispute, need not usually go beyond the company's stock books.

234. It has therefore been held that, as between seller and buyer of stock, pledgor and pledgee, mortgagor and mortgagee, the former respectively is entitled to vote until the assignment of the stock has been carried through upon the company's transfer books. Likewise, a trustee, executor, administrator, or guardian, as registered owner, is usually entitled to vote stock rather than the beneficiaries whom he represents. In a few jurisdictions, however, the transfer books are held to be merely rebuttable evidence of ownership, and the real owner of stock, upon producing satisfactory proof, may be allowed by the election judges

to vote. In several states it is provided by statute that no stockholder shall be permitted to vote unless he is registered as the legal holder for a certain time (usually one month) before the date of a corporate meeting.

2.—VOTING BY PROXY

235. Originally, if a stockholder desired to exercise his right to vote he had to do so personally. When, therefore, a stockholder was unable to attend a corporate meeting, as by reason of sickness or distance from the place of meeting, his vote was lost. In order to remedy this inconvenience, stockholders of business corporations are given the right to vote by proxy. It has been held in a few states that authority to vote by proxy must be derived from statutory or charter provision; but the majority opinion is that such authority may be conferred by by-law. Voting by proxy means that a stockholder has executed a power of attorney to another, who votes for him.

236. Usually, there is no prescribed form of proxy. In a few states it must be in writing, and the practice of most companies everywhere is to require this formality. In Pennsylvania, the proxy must be attested by one witness. It should set out with sufficient clearness that the agent named therein has authority to vote on his principal's behalf, and should be signed by a stockholder in exactly the same way that his name appears on his certificates. If he has some certificates drawn up with his name fully spelled out, and others whereon his name appears in an abbreviated form, he should execute two proxies to correspond therewith.

237. The following is a form of proxy frequently used by individual stockholders. It is given by Gilbert Ramsay, who, in the form of stock certificate shown in Section 229, appears to own certain preferred shares of The Empire Brass Works.

KNOW ALL MEN BY THESE PRESENTS:

That I, the undersigned, do hereby constitute and appoint William Dayton my true and lawful attorney, with full powers of substitution and revocation, to represent me at the special meeting of stockholders of The Empire Brass Works, to be held on the 9th day of November, 1910, at three o'clock P.M., and do hereby authorize and empower him to vote at said meeting and at any adjournment thereof, for me and in my name and stead, upon the stock then standing in my name on the books of said company, and I hereby grant my attorney all the powers that I should possess if personally present at said meeting.

Witness my signature and seal this second day of November, 1910.

(Signed) GILBERT RAMSAY (L. S.)

In the presence of

(Signed) HENRY P. THORNTON

238. When one corporation owns stock in another, it is important to have authority to vote such stock duly vested in some officer of the company or some other party. In some companies the by-laws endow the president with authority to act for the company in executing proxies on its behalf. The form on page 157 is for use in a case where it is thought wise to have the board of directors specially grant power to represent the company.

239. A proxy may be revoked by the one who gave it, even though the writing itself states that it is to extend for a certain length of time. Such time limit is regarded merely as a point beyond which the proxy shall not be valid. It is usually revocable even though it is given for a valuable consideration and is in terms irrevocable. Proxies are revoked by a giver's death, or by a transfer of the stock. By statute in several states, it is provided that no proxy

WHEREAS, this corporation is the registered owner of 1,000 shares of the common capital stock of the Golden Biscuit Company of Minneapolis, and is entitled to vote same at the yearly meeting of said company, which is to take place at its office, No. 343 Miller Street, Minneapolis, on October 17th, 1910, at noon.

THEREFORE, BE IT RESOLVED, that Joshua Bower be, and he hereby is, made and appointed the representative and attorney in fact of this corporation, to attend the said yearly meeting of the Golden Biscuit Company of Minneapolis, and any adjournment or adjournments thereof, with full power to vote thereat, in the name and on behalf of this corporation, the said one thousand shares of stock, and to sign any consents or other papers, and to do any and all such other things thereat suitable to be done by a stockholder of the Golden Biscuit Company of Minneapolis, as he, in his free discretion, may deem best for the interests of this corporation.

RESOLVED FURTHER, that whatever the said Joshua Bower may do hereunder at the said meeting or any adjournment or adjournments thereof in the name and on behalf of this company be and it hereby is fully-ratified and confirmed.

I hereby certify that the foregoing is a true copy of a resolution passed by the Board of Directors of the Central Flour Company at a regular meeting thereof at the office of the said company, 17 Marquette Street, St. Paul, Minnesota, on October 4th, 1910, at two P.M., a full quorum being present at said board meeting.

(Signed) ANTHONY GREEN,

Secretary,

CENTRAL FLOUR COMPANY.

(CORPORATE SEAL OF CENTRAL FLOUR COMPANY).

shall be valid after the expiration of a certain time from the date thereof, unless the principal has specified how long the proxy shall be good. It is sometimes provided by statute that no proxy shall be valid beyond a certain specified time from its date, no matter what may have been the giver's intention.

3.—VOTING TRUSTS

240. The desire of a majority of the stockholders of various corporations to maintain control, and to secure a continuance of their policies, has given birth to what are known as "voting trusts." A voting trust is effected in the following way. The stockholders who wish to join it transfer their stock to trustees, who thereby become legal owners and entitled to vote. The trustees in turn execute to each of those who have made transfers a declaration of trust, usually in the shape of a certificate of beneficial interest. In this way the transferers continue to enjoy the pecuniary advantages of stockholders, getting whatever dividends may be paid on the transferred shares, while the trustees maintain control of the corporation. The trustees, in exercising their voting power, cannot depart from the purpose of the voting trust. The certificates of beneficial interest are ordinarily transferable the same as real stock certificates. At the expiration of the term set for the duration of the voting trust, the certificates of beneficial interest are surrendered in exchange for stock certificates.

241. In a few jurisdictions, voting trusts have been held illegal as being against public policy. In other states they have been held void on the ground that the beneficial ownership of stock and the power of voting it are inseparable. The sounder view, however, has been gaining ground, namely, that a voting trust is not necessarily void for either of these reasons, but that its validity depends upon the legality of the object for which it was formed.

BRIGHTMAN v. BATES, 175 Mass. 105 (1900). Brightman hatched a scheme to obtain control of the United States Railroad Company, a corporation about to be organized under Massachusetts laws. He induced a number of persons, among them the defendants, to agree that they would take certain shares of stock when issued. In order to keep the control obtained by the purchase of a majority of the stock, they also agreed to enter into a voting trust, whereby all their stock, for a period of three years, was to be voted at each annual meeting for a certain board of directors. Brightman sued Bates and others for compensation for his trouble in bringing about this agreement. The defendants urged that the voting trust was against public policy and void, and that wages for services performed to that end were not legally collectible. *Held*, a voting trust is not essentially illegal, and in the absence of any evidence that it has been created for an illegal object, it must be deemed lawful. Brightman won.

SHEPANG VOTING TRUST CASES, 60 Conn. 553 (1890). A syndicate purchased a majority of the capital stock of the Shepang Railroad Company, which was placed in a voting trust to continue for five years. The ostensible purpose of the voting trust was to control the railroad so that an extension of the line would be made and a connection formed with another railroad. But the real purpose was to gain control of the board of directors and then have them enter into construction contracts with the members of the syndicate, thereby advancing the latter's interests. The Mercantile Trust Company was to act as trustee and was to vote the stock as directed by the syndicate. Certificates of stock were made out to the trust company as owner, which in turn executed certificates of beneficial interest to the members of the syndicate. One of the members becoming insolvent, his certificate was sold to William Starbuck. Starbuck then repudiated the voting trust, and demanded that the shares, represented by the certificate he had purchased, be assigned to him as legal owner. *Held*, the object of the voting trust, namely, to compel the corporation to execute contracts for the benefit of the syndicate, was illegal and the voting trust void. Starbuck was therefore entitled to demand real stock certificates in his own name.

(B) On what matters stockholders vote

242. The most important exercise of the voting powers of a company's stockholders is that of voting for its directors and sometimes for its officers, although the choice of officers is generally left to the directors. While the current business and general management of a corporation is intrusted to its officers and board of directors, the power of ultimate control is in the stockholders; since, by reason of their right to vote for directors, they may install such men as will manage the corporation according to their wishes.

243. There are certain corporate acts which cannot be legally done without the consent of the stockholders. Thus, the directors of a company are generally powerless to change its charter. This matter should receive the consideration and assent of the stockholders at a corporate meeting.

244. The subject of what corporate acts must be brought before the stockholders has been covered by statute in almost every state. When it is proposed to amend a company's by-laws, increase or decrease its capital stock, change the par value of its shares or its corporate name, create preferred stock, consolidate or merge with another corporation, or effect a dissolution, a stockholders' meeting must usually be called and their consent obtained.

245. In like manner, there are certain corporate acts which by reason of their importance have been expressly reserved, by statute or charter, to the stockholders. In several of the states, it is necessary to obtain the assent of stockholders if it is desired to mortgage a company's property, issue bonds or change its principal place of business, even though such matters may not involve an amendment of the charter.

QUESTIONS

1. How may a stockholder's right to vote be regulated?
2. How did stockholders vote according to the common law?
What is now the rule?
3. What is cumulative voting?
4. How do judges of election usually determine who has the right to vote as between two claimants?
5. Who has the right to vote as between buyer and seller, pledgor and pledgee, mortgagee and mortgagor of stock?
6. What is voting by proxy?
7. Draw a form of proxy.
8. Collins gave Murphy a proxy to vote his stock at all corporate meetings during the next six months. Three months later both men appeared at a corporate meeting and wanted to vote the stock standing in Collins's name. Murphy showed the judges of election his proxy, which yet had three months to run, while Collins claimed the right to revoke the proxy. How shall the judges decide?
9. What is a voting trust? What is the best rule as to its legality?
10. Barry formed a voting trust among several of the stockholders of the Johns Manufacturing Company for the purpose of electing a board of directors who would raise the salaries of all the officers and elect certain men to be nominated from among the members of the trust to fill the various official positions. One of the members of this trust died and his representative, Brown, repudiated the agreement to form a voting trust and demanded stock certificates for his shares. When the officers refused to issue him certificates of stock, Brown sued. Who wins?
11. Name some of the matters on which a vote of stockholders must be taken.

CHAPTER XV

CORPORATE MEETINGS AND STOCKHOLDERS' ELECTIONS

246. As a general rule, the acts of stockholders to be valid can be done in only one way, namely, at a corporate meeting which has been duly convened and conducted according to certain prescribed formalities. If there is the slightest possibility that the validity of any contemplated action of the stockholders will be disputed either by the minority stockholders or by third parties, care should be taken that all the necessary formalities are observed. It is only by doing so that the majority stockholders can bind the corporation.

247. Stockholders' meetings are either general or special. It is usually provided by statute, charter, or by-law that the stockholders shall meet once a year at a certain time and place to elect officers and directors for the ensuing year, receive reports of the officers for the past year, and review the company's affairs. Such meetings are called general meetings. Special meetings may be called from time to time as the exigencies of the business require action by the stockholders. The differences between general and special meetings, in regard to the manner of convening them, are important and will be noticed in their proper places.

248. Three things are essential to the validity of action by stockholders, under the law of nearly every state: (1) The meeting at which the action is taken must be properly

convened; (2) a quorum must be present; and (3) a certain specified number of stockholders must vote in favor of the measure.

FINLEY SHOE CO. v. KURTZ, 34 Mich. 89 (1876). Kurtz, an employee of the Finley Shoe Company, lent it money. For this sum and also for a sum due him for services, it was proposed to him that he should take shares of the shoe company's stock. All the stock of the shoe company was held by three men, one of whom informed Kurtz that they had agreed to pay him with stock. No formal meeting of stockholders ever took any collective action as a corporate body or group, on the matter of increasing the capital stock. The sums were afterwards noted on the company's books as having been paid and the company's reports to the Michigan Secretary of State, made without his knowledge, showed Kurtz to be a stockholder. Subsequently Kurtz was discharged by the company and sued for the sums alleged to be due him. The company's books failed to show that there had been any increase of stock, or that a stock certificate had ever been issued to Kurtz. *Held*, an undertaking by all the stockholders severally on its behalf does not bind a corporation. Where joint action is required by law, individual action is of no avail. Kurtz was therefore not bound to accept stock, but was entitled to the sums due him in cash.

(A) Calling the meeting

249. In order to avoid confusion and dispute, it is generally provided that the meeting shall be called by a certain person or persons. The by-laws usually intrust this duty to the president or the board of directors. By statute in a few states, and elsewhere in the case of many companies by by-law, it is provided that a meeting may be called by a certain number of stockholders' making a written demand therefor. If the person who is authorized to call meetings refuses to do so when he should, a stockholder may bring suit to compel him to perform his duty.

250. Properly to convene a special meeting, it is necessary that all the stockholders be given notice of the time

and place of the meeting and of the business to be transacted. The time of holding the meeting must be reasonable and convenient, and must be specified with particularity. The hour at which the meeting shall be called should be named. At the common law, and in most states by statute, meetings must be held within the state of incorporation. But in Delaware and a few other states, by statutory authority, the meetings may be held anywhere. In any case, the notice should state the precise place of meeting.

251. The character of the notice is usually prescribed by a company's by-laws and, in some instances, by statute. It frequently varies in character with the nature of the business to be brought before the meeting. The by-laws, as a rule, provide that a written or printed notice shall be mailed to each stockholder at his registered address a certain number of days prior to the meeting. In addition to this, the laws of several states require that in certain cases notice shall be given by publication in one or more newspapers a fixed number of times. Where meetings are called for the transaction of such important business as consolidating with another corporation, increasing or reducing the capital stock, dissolving the corporation, etc., it is sometimes provided by statute that notice of a highly formal character be given.

252. In determining what is sufficient notice in any case, one should examine the statutes of the state of incorporation, the corporate charter, and the by-laws. The law on the subject varies widely throughout the Union, and defies anything approaching a generalization.

253. In the absence of express provision, no call need be made or notice given of an ordinary general meeting. If the time, place, and character of the business to be transacted are provided for in the charter or by-laws, the stockholders are presumed to be aware of such provisions, and are bound by them. But notice should be given of

special meetings, and of general meetings where some special matter is to be taken up, or where it is required by statute, charter, or by-law. The purpose of requiring such notice is to give every stockholder an opportunity to vote upon any action which calls for the stockholders' approval. And even where no notice of a regular stockholders' meeting need legally be given, courtesy and good business practice cause most companies to give it the same as if it were required by law.

UNITED GOLD, ETC., Co. *v.* SMITH, 90 N. Y. Supp. 199 (1904). The American Gold Mines Company entered into negotiations with the Consolidated Copper Mines Company with a view to merging. In order to effect this end, the American Company's officers called a meeting of its stockholders, the notices reading that the meeting was to be held "for the purpose of considering a plan of amalgamating the interests and properties of this company with that of the Consolidated Copper Mines Company, and for such business in relation thereto, as well as the general business of the company, as may be presented to the meeting." At the meeting, Smith, who had sufficient proxies to give him a controlling interest in both companies, put through a resolution for the issuance to him of certain stock in consideration of his services. The validity of this resolution was afterwards attacked on the ground, among others, that no notice of such a measure had been given to the stockholders. *Held*, the notice was insufficient to give the stockholders any intimation that such a measure would be presented at the meeting, and the resolution was therefore void. Smith, being in a position of control, was bound to be very frank with the minority stockholders, and could not properly cover his intentions to bring up his own claim at the special meeting by a vague notice that various matters in relation to "the general business of the company" might be presented to the meeting.

254. The following is a specimen form of notice to stockholders of a special meeting.

MEXICAN BEEF COMPANY

1145 Granger Street, Kansas City, Kansas.

Notice is hereby given, by order of the Board of Directors, that a special meeting of the stockholders of the Mexican Beef Company will be held at the company's office, No. 1145 Granger Street, Kansas City, Kansas, on October 27, 1910, at 11 A.M., in order to consider and take action upon a proposition to sell all the company's property and assets to the Interstate Beef Company for the sum of Two Million, Five Hundred Thousand Dollars (\$2,500,000) and for the transaction of all business which may properly be brought before said meeting.

September 29, 1910. *(Signed)* J. CASTLEMAN RODGERS,
Secretary.

(B) A quorum

255. The second essential to the validity of any stockholders' action is that a quorum be present at the meeting where such action is taken. How many stockholders are required to constitute a quorum is generally arranged in a company's by-laws. Where there is no express statutory, charter, or by-law provision as to this matter, it would seem that ordinarily any number of stockholders, no matter how few, may bind the corporation. The by-laws usually require that a majority of the outstanding stock be present or represented at a corporate meeting. And even more than a majority of outstanding stock is sometimes necessary.

(C) Requisite number of assents

256. The third essential to the validity of stockholder's action is that it must be supported by the necessary num-

ber of affirmative votes. It has been held that, in the absence of express provisions requiring a certain vote, a majority of the votes actually cast at a meeting is sufficient to validate a measure proposed and voted upon thereat, provided a quorum is present. This does not mean that a majority of votes actually present is required, but merely a majority of the votes cast.

257. There is, however, little chance for a dispute to arise on this point, for it is usually provided expressly what number of votes shall be necessary to carry a measure. In ordinary matters, the by-laws of most corporations require an affirmative majority vote of those present. In many states the statutes require a two thirds or a three fourths vote to authorize the creation of preferred stock, the execution of a mortgage, an alteration of the charter or the by-laws, an increase or a reduction of the number of shares, a merger with another corporation, or the company's dissolution.

258. The conduct of corporate meetings is for the most part regulated by the by-laws. See Chapter V. These usually provide who shall be the presiding officer and who shall assist him, what shall be the order of business, the manner of voting, etc. Although slight infringements of such regulations are not always fatal to the validity of stockholders' action, it is well to observe them, especially as regards the manner of voting. Where a statute provides a method of voting it is quite important that it be strictly followed.

259. Corporate elections, although frequently regulated only in a company's by-laws, are in a number of states provided for by statute. The voting is generally cumulative and by ballot. The rules of law which regulate the right to vote in other corporate matters are for the most part applicable to the right to vote at such elections.

QUESTIONS

1. The officers of the Oregon Smelting Company wished to increase its capital stock. They sent a representative around to each of the twenty-two stockholders and obtained the assents of twenty to the increase. No meeting was ever held. When the company attempted to sell the new stock, Bradley, one of the two dissenting stockholders, applied for an injunction to restrain the company from putting this stock on the market. Should the injunction be granted?

2. What two kinds of stockholders' meetings are there?

3. What three things are essential to the validity of stockholders' action?

4. Who calls stockholders' meetings?

5. Must notice be given of general meetings? Of special meetings?

6. How is notice of corporate meetings usually given to stockholders?

7. How is the question as to what is a quorum usually determined? In the absence of any provision governing this matter, what number of stockholders constitute a quorum?

8. How many votes are usually necessary to validate a measure voted on at a corporate meeting?

9. What regulates the number of votes necessary to pass a resolution?

CHAPTER XVI

THE RIGHT OF STOCKHOLDERS TO INSPECT THEIR COMPANY'S BOOKS AND TO INTERFERE IN THE MANAGEMENT OF ITS AFFAIRS

(A) The right to inspect the company's books and papers

260. As a general rule, every stockholder of a corporation has the right to inspect his company's books and papers, provided he does so at a proper time and for a proper purpose. It often becomes quite important for a stockholder to examine into the corporate affairs, in order to ascertain whether or not the directors are conducting them properly. In the majority of cases the corporate records are the only sources from which the desired information may be obtained.

261. This right of inspection, as it exists at common law, is not an absolute right. The application for an inspection must be made to the proper custodian of the books during business hours. The inspection must be made for a specified and proper purpose. A stockholder has no right to inspect his company's books and papers for purposes of speculation or merely to gratify his curiosity. If the stockholders were given an unlimited right of inspection, the business of the corporation would be subject to continual interruption.

262. It has, therefore, been held that to entitle a stockholder to an inspection against the management's wishes, he must show reasonable and specific grounds for suspect-

ing fraud or gross carelessness. Of course, a stockholder has no right to inspect the records for purposes which will be injurious to the corporation. In making his inspection a stockholder may have the assistance of an expert accountant and an attorney, and may usually make copies of the records.

COMMONWEALTH v. PHOENIX IRON Co., 105 Pa. 111 (1884). George H. Sellers was a stockholder in the Phoenix Iron Company. He alleged that for many years the company had been prospering, although no dividend had been declared; also that the business was being fraudulently managed by the directors and that they were misapplying the company's funds and property. Sellers requested information about the business, but was refused. Then he sued to compel the management to submit the company's books to his inspection. *Held*, Sellers had a right to examine the books, for certain specific facts which he alleged to support his charges of fraud seemed at least to make his suspicions reasonable.

HEMINWAY v. HEMINWAY, 58 Conn. 443 (1890). The plaintiff was a stockholder and a director in the Heminway & Sons Silk Company. Prior to bringing suit he had entered the company's office, obtained its letter file, and started to make memoranda for the purpose of organizing a rival company. The defendant, who was the Heminway Company's secretary and the custodian of its books, requested the plaintiff to return the letter file, which the latter refused to do. The defendant thereupon forcibly took it from the plaintiff. The plaintiff sued for assault and battery. *Held*, the defendant's conduct was justifiable. Neither stockholders nor directors have a right to inspect the books or papers for purposes hostile to the corporation.

263. But in almost every state a stockholder has the right to learn who his fellow stockholders are and to copy a list of them from the company's books. Indeed, many states compel companies to keep an indexed list of their stockholders, to which all such stockholders shall have access.

264. The by-laws of many corporations regulate the right to inspect the books and papers. Such by-laws are binding upon the stockholders, provided they are reasonable and do not substantially take away the right of inspection.

265. Most of the states have enacted laws regulating the inspection of corporation books and papers. The effect of a statutory enactment upon the right of inspection differs widely in the several states. In New York, South Dakota, and a few other states, the stockholders' rights in this respect have been greatly enlarged. The Alabama statute provides that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation, at reasonable and proper times." In states where such laws exist, a stockholder has the right to examine the corporate records without giving any reason therefor, provided of course that it is not for an illegal purpose or injurious to the corporation. In other states, however, the laws require a stockholder to specify a substantial reason for examining the corporate books—for example, that fraud or gross carelessness on the management's part will go unnoticed, unless such inspection is allowed.

266. The usual remedy of a stockholder who has been denied the right to inspect corporate books is by petition for a writ of mandamus. In a proper case, the court issues this writ against the custodian of the corporate records, commanding him to submit to the petitioning stockholder certain specified records. In addition thereto, a stockholder may sue to recover for damages which he has suffered in consequence of such denial. Moreover, some states have passed laws imposing a penalty upon the custodian of corporate records who wrongfully refuses to allow a stockholder to examine them.

(B) The right to interfere in the management of the corporation

267. To matters within the scope of the corporate charter is applicable the rule that the majority in interest of the stockholders shall govern. But the active management of a corporation is in charge of its board of directors. Although the ultimate power of control is vested in the stockholders, it is chiefly exercised through their chosen representatives. Therefore, in order to safeguard themselves, the stockholders should elect honest and competent directors to manage their corporation. Having made their election, they cannot be allowed to interfere in the management of the corporation, except in a few cases which are considered in this chapter.

268. As we have seen before, a corporation is legally regarded as a party separate and distinct from its stockholders. An injury to a corporation must therefore be sued for by the corporation itself; and the stockholders, although they are the ones who actually suffer thereby, are usually powerless to redress the injury. As a rule they must rely on the faithfulness of their representatives to take the proper legal steps.

269. In many cases, however, the courts have extended a helping hand to injured stockholders. The relation existing between the stockholders of a corporation and its managing body is one of trust and confidence. The latter ought to act for the best interests of all the stockholders as a collective body, and there should be no fraud or oppression on the part of the directors or the majority stockholders.

270. But before the courts will grant relief, a shareholder must take every reasonable step, within the corporation itself, to move the managing body to perform its duty. Ordinarily, he must apply to the managing body to protect

the corporation, and, this having failed, he must then call upon the body of the stockholders to take action. Of course, where such steps would plainly be useless, he need not do all this. If the directors are themselves the malefactors, it would obviously be useless to apply to them to redress the injury. Again, where, before a stockholders' meeting could be held, irreparable harm would happen to the corporation, the stockholders need not be called together.

271. The cases where such relief will be granted may be grouped under two general heads. (1) Cases where the corporate management is undertaking things which are beyond the company's powers. (2) Cases where the management is defrauding or oppressing some or all of the stockholders.

1.—ULTRA VIRES TRANSACTIONS

272. When the stockholders of a company have entered into their contract of association, they invest their property to be employed in a certain enterprise specified in the corporate charter. Those who control a corporation, whether they are the directors or the majority stockholders, rest under a duty to apply the property to working out the purpose for which the corporation was created. Therefore, any misapplication of the company's funds is a breach of trust, and even a single shareholder may bring suit to enjoin it, and confine the enterprise to its original scope. Moreover, an *ultra vires* act sometimes subjects a charter to forfeiture, so a complaining stockholder may have this additional ground for bringing suit.

273. Unless provision for amendment has been made in the charter or in the law of the state which granted the charter, even a majority of the stockholders cannot accept the benefit of a statute permitting a corporation to deviate

from its original purpose. For example, a stockholder may obtain the decree of a court of equity to enjoin an unauthorized merger (see Section 429); or to enjoin a sale or a lease of all the corporate property and the abandonment of its business, where the exigencies of the business or the financial condition of the corporation do not demand any such change. See Section 439. But nowadays most corporations are subject to laws permitting an amendment of a company's charter or a transfer of its assets at the instance of a majority of its stockholders, provided (in the case of a charter amendment) that the change is sanctioned by the proper state authorities.

CHEROKEE IRON CO. v. JONES, 52 Ga. 276 (1874). The Cherokee Iron Company was chartered to manufacture pig iron. The directors undertook to erect and operate a corn and flour mill. Jones, one of the stockholders, filed a bill in equity to enjoin the use of the corporate funds for such purposes. The court granted the injunction and *held* that the erection and operation of a flour and corn mill was *ultra vires*, unlawful, and a breach of trust.

CARSON v. IOWA CITY GASLIGHT CO. 80 Ia. 638 (1890). The Iowa City Gaslight Company was chartered to manufacture gas, coke, and coal tar. It agreed to supply Iowa City with electric light. Carson was a stockholder in a rival corporation which had been organized for the express purpose of supplying Iowa City with electric light. Carson subsequently acquired a number of shares of stock of the Iowa City Gaslight Company and filed a bill in equity to enjoin the execution by that company of its *ultra vires* contract to supply Iowa City with electric light. *Held*, as a stockholder he was entitled to such relief.

2.—FRAUDULENT OR OPPRESSIVE ACTS BY DIRECTORS OR MAJORITY STOCKHOLDERS

274. Where anything of a fraudulent or oppressive nature is done or contemplated by the board of directors in connection with some third person or corporation, or among

themselves, or with other stockholders, and serious injury is threatened to the corporation, or to some of the stockholders, a stockholder has a right to relief. This follows from the fact that a duty rests upon the managing body to conduct the affairs of the corporation for the best interests of all the stockholders collectively, and not of any particular class of them.

DODGE v. WOOLSEY, 18 Howard (U. S.) 331 (1855). In 1845 the State of Ohio chartered the Commercial Branch Bank. The charter provided the basis or average upon which the property of the bank was to be taxed. In 1852 the state passed a law which raised the average of taxation of the bank's property. The directors of the bank, although often requested to do so, refused to resist the collection of the tax. Woolsey, a stockholder of the bank, filed a bill in equity against the bank and Dodge, the tax collector, for an injunction to restrain the collection of a tax levied under the authority of the act of 1852. The court granted the injunction and *held* that the inaction of the directors of the bank amounted to a breach of trust.

GRAY v. NEW YORK STEAMSHIP CO., 3 Hun (N. Y.) 383 (1875). The New York Steamship Company was chartered by the State of New York to run steamships between New York City and Norfolk, Virginia. While the company was prospering, a majority of its directors, in order to serve their own interests and to ruin the company, fraudulently sold a number of its steamboats to a rival concern for a compensation far below their value. The board of directors and a majority of the shareholders, although requested to do so, refused to take any steps to avoid the sale. Gray, a stockholder, sued to have the sale set aside. *Held*, the sale should be declared void.

275. As has been said before, the majority of the stockholders have the ultimate power of control in all matters within the scope of the corporate charter. In such matters, the courts refuse to interfere merely because the minority stockholders differ from the majority in their views as to

certain transactions. But where the majority are oppressively or fraudulently violating the rights of the minority stockholders, the latter are entitled to relief. It not infrequently happens that a few persons obtain the ownership of a majority of the shares of stock in a corporation and thereby elect and control the board of directors and other agents, and then run the corporation to benefit themselves in utter disregard of the minority interests.

DAVIDS v. DAVIDS, 120 N. Y. Supp. 350 (1909). The Thaddeus Davids Company, whose capital stock was only \$30,000, paid its president a yearly salary of \$20,000. Of this sum he retained \$2,500 for his services and turned over the remainder to three other stockholders. After the president's death, three of the stockholders, who composed the board of directors, voted the president, the secretary, and the treasurer each a salary of \$8,000 and then elected themselves to these offices. Such large salaries more than ate up the profits of the business. The services rendered by the president were purely nominal, while those of the secretary and the treasurer were worth in each case about \$2,000 a year. The plaintiff, a minority stockholder, sued to compel the officers to return the moneys received by them under the name of salaries. *Held*, the defendants must make restitution, for the voting of such exorbitant salaries was a fraud.

KNOOP v. BOHRICK, 49 N. J. Eq. 83 (1891). The Saxonian Manufacturing Company was chartered under New Jersey laws with \$20,000 capital stock, there being 200 shares of \$100 par value. Fifty shares, full paid, were issued to Knoop; 48 shares to his wife; 50 shares to Bohmrick's wife; and one share to a man who was under Bohmrick's domination. To Bohmrick were issued the remaining 51 shares, for which he promised to pay. Thus Bohmrick and his wife were majority stockholders and controlled the corporation. Knoop repeatedly urged Bohmrick to pay for his shares, but the latter failed to do so. Knoop then filed a bill in equity to compel Bohmrick to make payment. *Held* that Bohmrick's refusal to pay was a fraud perpetrated by him under cover of his power to control the corporation. Knoop was entitled to the relief which he sought.

276. Ordinarily, a stockholder has no right to enter a defense on behalf of a corporation. But where a suit against a corporation is brought about by collusion between the party suing and the company's managers, a shareholder may secure relief. If the suit against the company is brought in a court of law he may obtain an injunction against it, and if it is an equity suit he may interfere and plead any defense which could be set up by the corporation itself. Again, if the management is grossly neglecting its duty and letting a case go against the company by default, a shareholder may be allowed to interfere for the company's benefit.

QUESTIONS

1. Under what conditions has a stockholder the right to inspect the books and papers of his corporation?

2. George was a stockholder of the Wilson Creek Zinc Mining Company. He went to the secretary of the company and demanded several of the books to be produced for his inspection. On being asked why he wished to see the books, George declined to give a reason. The secretary knew that George was a director of another zinc mining company and refused him permission to inspect the books of the Wilson Creek Zinc Mining Company. Can George force the secretary to produce the books?

3. James Patrick, a stockholder in the Michigan Salt Company, demanded a list of the stockholders in the company with the number of shares owned by each. He refused to say why he wanted such a list, claiming that he had an absolute right to have such information. Is he right?

4. The by-laws of the Helena Copper Mining Company provided that no stockholder was to have the right of examining the company's books except by the express permission of the board of directors. Watson, a stockholder, had good reason to suspect fraud in the management of the company and on this ground asked to see the books. The secretary told him he must wait until the next meeting of the board of directors, four months thereafter. This Watson refused to do and asked an order from the court to compel

the production of the company's books for his inspection. Should the order be granted?

5. What is the remedy of a stockholder who has been unjustly denied the privilege of examining his company's books?

6. When have stockholders the right to interfere in the management of corporate affairs? Has a stockholder the right to sue personally for an injury inflicted on the corporation when he owns all the stock of the corporation?

7. The Kennebec Lumber Company was chartered to deal in lumber. At a stockholders' meeting, which all the twenty stockholders of the company attended, a resolution was passed by a vote of 2,971 shares of stock to 29 to build a plant for manufacturing paper. Grimes, the lone dissenting stockholder, sought an injunction from a court of equity to prevent the erection of the paper manufacturing plant. Should the injunction be granted?

8. What limitation rests on the power of a majority in interest in a corporation to direct the carrying on of the company's business?

9. The majority of stock of the Texas Chocolate Company was owned by three men, who had elected themselves the board of directors and also put themselves into all the official positions. Winslow, one of several minority stockholders, alleged, in a suit to force the directors to declare a dividend, that the company which was a comparatively small one, was carrying a surplus fund of several thousand dollars of which no use was made and that the president had said that they intended to squeeze out the minority stockholders and therefore would not declare dividends. The directors defended on two grounds. First, that Winslow had made no effort to get relief inside the corporation and, second, that Winslow had no right to interfere with the directors in such a matter. How would you decide on each defense?

10. The Eastern Electric Company was engaged in the business of manufacturing and selling a patent electric light. Three of the five directors of the company were the principal stockholders of the Western Electric Company, which had instituted proceedings against the Eastern Electric Company to have the patent declared void and to enjoin the Eastern Company from manufacturing and selling the light on the ground that it was an infringement on a prior patent of the Western Company. The directors of the Eastern Electric

Company declined to answer in this suit although requested to do so by Jones, a stockholder. Jones then asked leave of court to interpose a defense for the company, alleging that judgment would go against his company if he waited until a stockholders' meeting could be called to depose the directors and elect others in their stead. Should Jones be allowed to defend for the company?

CHAPTER XVII

THE RIGHT OF STOCKHOLDERS TO DIVIDENDS

277. The main thing that a member of a business corporation generally looks to is the right which he enjoys as one of the owners of the concern to a share in its earnings. His share in the earnings usually comes to him in the form of dividends.

278. Dividends have been defined as that part of a company's profits which are appropriated by resolution of its board of directors for division, on demand, or at a fixed time among the stockholders according to their respective interests.

(A) Various kinds of dividends

279. Usually dividends are paid in cash, and a stockholder gets a certain sum of money for each share of stock owned by him. Thus, in a corporation with shares of \$100 par value, a four-per-cent dividend would entitle a stockholder to \$4 on each of his shares; but if the par value of the stock were \$50, a four-per-cent dividend would yield the stockholder only \$2 for each share.

280. Sometimes, however, the directors of a corporation, instead of distributing its profits among the shareholders in the form of a cash dividend, may declare a stock dividend. Such a dividend is in effect an increase of the capital stock. This increase is made by issuing additional shares which represent the company's profits and by divid-

ing them among the stockholders in proportion to their respective interests.

281. This is often done when it would be inconvenient for a company to pay in cash the amount represented by the new shares. When a concern prospers, its business usually increases and new working capital is needed. Now to pay out all the profits in cash dividends might hamper the company's operations. A stock dividend permanently capitalizes the profits represented by it, while at the same time giving the shareholders something which clearly indicates their participation in the company's prosperity.

282. Ordinarily, a corporation has power to declare a stock dividend, unless prohibited by the general law, as is the case in Illinois and Wisconsin. In Massachusetts railway corporations may not declare stock dividends without receiving authority so to do from the General Court.

283. Scrip dividends are much like stock dividends, except that the holder of scrip usually cannot vote it. The rights of a scrip holder depend upon the contract under which the scrip is issued. This contract is generally contained in the scrip certificate.

284. Scrip certificates are of many varieties. Familiar examples of them are those which entitle the holder to exchange his scrip for stock or bonds of the company issuing the scrip on the happening of a certain event, or to the payment of money at a certain date or at the company's option.

285. A property dividend is a division of property instead of cash among the stockholders. For example, sometimes one corporation is purchased by another and in return for the property and franchises of the first corporation, the stockholders therein receive stocks or bonds of the purchasing corporation in proportion to their respective interests as stockholders in the old concern. A dissenting

stockholder of the old company may, however, usually insist upon receiving payment for his interest in cash.

(B) When dividends are to be paid

286. Until dividends are declared, the profits are part of a company's assets, and do not belong to the stockholders individually. Before a dividend has been declared, therefore, the profits must not be deemed a debt due to the stockholders from the corporation even though its financial condition is such that the directors ought to declare a dividend.

287. The directors alone have power to declare dividends from the earnings of the corporation, and to fix the amount thereof and the time and manner of payment. Without the declaration of a dividend the stockholders have no fixed and certain rights, only a potential right to participate in the profits of the enterprise according to their respective interests. But when the stockholders are notified that a dividend has been declared, an amount sufficient to pay it is separated, in the eye of the law, from the other assets, and is held by the company in trust for its stockholders. Therefore, when the directors have lawfully declared a dividend out of profits and the time set for paying it arrives, there is a debt due by the corporation to the stockholders. If the corporation refuses to pay the dividend when thus due, a stockholder may maintain an action for the amount of his dividend. The directors cannot rescind their declaration of a dividend unless the company's financial condition would render the payment thereof illegal.

BEERS *v.* BRIDGEPORT SPRING Co., 42 Conn. 17 (1875). Beers, the owner of stock in the Bridgeport Spring Company, filed a bill in equity to compel the corporation to pay him certain dividends which had been declared by the board of directors. *Held*, when the directors declared the dividends in question, the portion thereof accruing to each stockholder was thereby severed from the com-

mon funds of the corporation and became his individual property. Thenceforth the company owed him a debt, payment of which he might demand, and upon refusal, enforce. No time having been specified for the payment of the dividends, the presumption of law is that they were to be paid within a reasonable time.

288. The discretion of directors with respect to the declaration of dividends has been held in Massachusetts to extend so far as to permit them to rescind a dividend if the declaration of it has not been communicated to the stockholders or become public in any way.

FORD v. EASTHAMPTON RUBBER THREAD CO., 158 Mass. 84 (1893). The rubber company's directors declared a twenty-per-cent dividend. At a subsequent meeting on the same day they voted to rescind the twenty-per-cent dividend and declared a six-per-cent dividend. The fact that a twenty-per-cent dividend had been declared was not published or communicated to the stockholders and no fund had been set aside to pay it. Ford, a stockholder, refused to accept the six-per-cent dividend and sued to recover the twenty-per-cent dividend. *Held*, the directors' vote to declare a twenty-per-cent dividend did not bind the corporation. Before the division had been made and before the position of the stockholders had been changed in reliance on the vote, it was within the directors' power at a meeting subsequent to that at which the dividend was declared to rescind it.

289. The declaration of dividends is ordinarily a matter resting in the directors' discretion. The courts therefore will not usually interfere with the directors and compel them to pay dividends unless they are abusing their power and acting so fraudulently or oppressively in refusing to declare dividends as to be guilty of bad faith toward the stockholders. Even though a corporation has a large surplus fund, the directors may, in the exercise of their judgment, retain it as a surplus, or expend it in improvements, instead of distributing it among the stockholders in the shape of dividends.

McNAB v. McNAB & HARLIN MFG. Co., 62 Hun (N. Y.) 18 (1891). McNab was a stockholder in the McNab & Harlin Manufacturing Company, which had a capital of \$150,000 and a surplus of \$152,209. He sued to have all or part of this surplus distributed as a dividend. Dividends at the rate of twenty-five per cent had been paid for a period of ten years. *Held*, the directors ought not to be ordered to distribute the surplus as a dividend. They were profitably employing it in purchasing materials used by the company in its manufactures, and as they considered it for the company's best interest not to divide this surplus they could not be said to have acted unreasonably or capriciously.

290. While a court will not, as a general rule, override the decision of a company's directors in refusing to declare dividends, yet when it appears that they are guilty of bad faith, or a willful abuse of their discretionary powers, a court will compel them to declare a dividend of unused profits. The stockholders in business corporations naturally expect to enjoy the fruits of successful enterprises in regular distribution of profits. As long as the directors exercise their honest judgment they will not ordinarily be interfered with, but once they abuse the confidence reposed in them, either in declaring or in refusing to declare a dividend, the courts will interfere and compel them to take proper action.

LAUREL SPRINGS LAND CO. v. FONGERAY, 50 N. J. Eq. 756 (1893). Fongeray, a director and a stockholder in the Laurel Springs Land Company, filed a bill in equity to compel a declaration of dividends. He proved that the company had surplus profits of more than twenty times the original capital and that those who constituted a working majority of the board of directors had no honest purpose to enlarge the company's business, but under this pretext had refused to declare any dividends, while awaiting an opportunity to absorb the profits by fraudulent devices. *Held*, a dividend of all the net earnings not needed for the company's legitimate business must be declared. Furthermore, the directors must thereafter

declare such reasonable dividends from time to time as the financial status of the business might warrant.

291. The declaration of dividends is regulated by statute in several states. The Delaware laws empower the directors of a corporation, after reserving over and above its capital stock paid in, such sum, if any, as is fixed by the stockholders, to declare a dividend among its stockholders of the whole of its accumulated profits in excess of the amount so reserved; but the corporation may, in its certificate of incorporation, or in its by-laws, give the directors power to fix the amount to be reserved. In New Jersey, New Mexico, and North Carolina directors are required, unless the charter or by-laws provide otherwise, to declare yearly dividends of all net profits. In Tennessee the directors of mining, quarrying, boring and manufacturing companies must declare a dividend whenever there is an amount in the treasurer's hands sufficient to pay four per cent on the capital stock. In Texas the directors, when required by one third of the stockholders, may declare dividends of the net profits from the business of the corporation as they shall deem expedient or as the by-laws may prescribe.

292. Generally, the only funds available for the payments of dividends are a company's profits. Except upon the dissolution and winding up of the company, dividends cannot therefore be paid out of capital. The capital stock of a corporation should be kept intact for the benefit of its creditors. Moreover, each stockholder is entitled to insist that the company's capital be maintained unimpaired for the transaction of its business. Sometimes, however, a corporation obtains the consent of the prescribed number of its shareholders, and also of the state authorities, to reduce its capital. When this is done the excess portion of the former capital is often distributed in the shape of dividends.

(C) Results of paying illegal dividends

293. In many states if the directors of a company declare dividends the payment of which impairs the company's capital, they become jointly and severally liable for all debts of the company then existing or incurred by it thereafter so long as they continue in office, or else (in some states) for the amount of capital so paid out in dividends. Provisions of this character are found in Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Porto Rico, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In Arizona, Georgia, Tennessee, and Utah, if directors declare a dividend when there are no profits on hand with which to pay it, they are guilty of a misdemeanor. In Louisiana the corporation must pay a fine of \$1,000 to the state and forfeit its charter. Maine makes the directors liable to a fine of not more than \$2,000, and to imprisonment not exceeding one year. Minnesota makes the payment of dividends when there are no profits a felony, and subjects the directors to a fine of not more than \$5,000, or to imprisonment not exceeding three years, or both. In South Carolina the directors are liable to a fine of not less than \$500 and to imprisonment of not less than six months.

294. Many of these states provide further that any director who is absent from a meeting at which dividends are illegally declared, or who is present but dissents from the action of the board, may exonerate himself from the fines and penalties imposed by causing his dissent to be entered on the minutes of the directors' proceeding at the time the

dividend is declared, or immediately after he gets notice thereof.

295. Where a dividend is paid to the stockholders when there are no profits available for distribution, such dividend is illegal and may be recovered back from the stockholders by the corporation in a suit brought at the instance of its creditors. Or if the directors are about to pay an illegal dividend, a stockholder may maintain a suit to enjoin such improper action.

LEXINGTON L., ETC. INS. CO. v. PAGE, 17 B. Mon. (Ky.) 412 (1856). The directors of the Lexington Life, Fire and Marine Insurance Company made the mistake of regarding premiums on unexpired risks as profits and declared illegal dividends out of these premiums. Page, a creditor, in a suit against the insurance company, which had passed into an assignee's hands, asked that the assignee, Buckner, be required to collect these illegal dividends from the stockholders and account for them as part of the assets of the trust. *Held*, Buckner should proceed to collect these dividends from the stockholders, as they had been declared under a belief that there were profits to divide when in fact there were none. The stockholders were not entitled to them, as they had been paid over and received under a common mistake. Therefore the corporation having become insolvent had a right to reclaim such dividends as were illegally paid.

(D) The right to a dividend as between rival claimants

296. Ordinarily a dividend belongs to him in whose name the stock stands at the time the dividend is declared. But the directors of a company usually declare a dividend some weeks before the time of payment, and order that it shall be paid to the stockholders of record at the latter date or at some intermediate date. This order is binding in case of a transfer between the time the declaration is made and the time at which the list of participating stockholders is declared fixed, unless the parties to the transfer agree

otherwise. Many companies close their stock books for about a week prior to the day of payment in order that a proper list of stockholders entitled to the dividend may be completed.

297. Under stock exchange rules, after a company's books are closed pending the payment of a dividend, its stock is sold "dividend off," that is to say "*ex dividend*." Suppose the books close May 4th, and the dividend is payable May 9th to stockholders registered on the latter date. Suppose A buys some stock from B on May 1st and more stock on May 5th. The dividend on the latter stock belongs to B but that on the former goes to A. Even though A has neglected to have the stock which he bought May 1st promptly registered in his name, and the dividend thereon is paid to B, B must turn it over to A.

298. When stock has been pledged and transferred on the company's books to the name of the pledgee the latter is entitled to dividends, for which he must account to the pledgor. But where the stock still stands in the pledgor's name, the company goes on paying dividends to him as the registered owner.

299. Undivided profits of a corporation are part of its assets, and the purchaser of a share of stock becomes entitled to participate in proportion to his interest in the company if a dividend thereof is declared while he continues to own such stock. Therefore a holder of stock at the time when profits are distributed in the shape of a dividend is usually entitled to them, as against a former holder during the period when they were earned.

300. Where disputes arise among beneficiaries of a trust estate, the problem is sometimes more complicated. The ordinary holder of stock is absolutely entitled to all that comes out of it, but the situation is somewhat altered where one party is entitled to receive only the income from the stock, which after his death is to go to another party.

In a case of this kind, while the life tenant is plainly entitled to ordinary dividends declared and paid while he remains the beneficiary, it may be difficult to determine which of the two parties should get extraordinary cash or stock dividends.

301. The person who enjoys the income is called the "life tenant," and the person who gets the stock upon the life tenant's death is called the "remainderman." Which of these two is entitled to stock dividends or extraordinary cash dividends? Most American courts answer this question, as to extraordinary cash dividends, by inquiring into the period when the fund represented by them was earned. If this fund of surplus profits was accumulated during the lifetime of the one by whose will the trust estate was created, but not distributed by the corporation until after his death, it is held to be principal. Therefore it will go eventually to the remainderman, the life tenant being entitled only to the income thereof. But if the fund was accumulated after the death of the testator who created the trust estate, it is held to be income and therefore becomes the life tenant's absolute property, when paid out in the shape of an extraordinary cash dividend.

COBB v. FANT, 36 S. Car. 1 (1891). Martha Dawson transferred to O. H. P. Fant forty-three shares of bank stock in trust to pay over the income to her for life, and after her death to pay over the income to her daughters, with remainder over to third parties. Afterwards Martha Dawson remarried and her name was changed to Cobb. When the stock transfer was made, undivided profits had already accrued. And while dividends continued to be declared and paid over every year, surplus profits were made and accumulated until finally the bank closed its business and distributed its assets. The accumulated profits then amounted to 400%. *Held*, the life tenant, Mrs. Cobb, was entitled to all the profits which accumulated after the date of the transfer, but that profits already accrued at that date were part of the principal of the estate and would go ultimately to the remainderman.

302. However, in Georgia, Kentucky, Maine, Massachusetts, New York, and Rhode Island, all such cash dividends are regarded as income and belong to the life tenant. And in most states stock dividends are regarded as principal, no matter when the accumulation was made. Accordingly they belong to the remainderman, subject, of course, to the right of the life tenant to enjoy the income thereof while he lives. But Maryland, New Hampshire, New Jersey, Pennsylvania, and Tennessee apply to stock dividends the same rule as that laid down above in the case of extraordinary cash dividends.

MINOT v. PAINE, 99 Mass. 101 (1868). A trustee filed a bill in equity to determine whether stock dividends declared by a railroad company were to be treated by him as income belonging to the life tenant Paine, or as capital to be kept for the remaindermen, the legatees of the stock. *Held*, cash dividends, however large, are income, to which the life tenant is entitled; and stock dividends, however made, are capital and go to swell the trust estate, being distributable ultimately to the remaindermen.

GIBBONS v. MAHON, 136 U. S. 549 (1889). Ann W. Smith bequeathed 280 shares in the Washington Gaslight Company, in trust to pay the dividends accruing thereon to Gibbons for life. Upon Gibbons's death the shares were to go to Mahon. A stock dividend of 100% was declared out of "net earnings, income, and profits." A question arose as to the disposition of the 280 additional shares. *Held*, the life tenant was entitled to the dividends on the whole 560 shares and nothing more. Money earned by a corporation remains its property, and does not become the property of the stockholders unless and until it is distributed among them. Reserved and accumulated earnings, so long as they are held and invested by the corporation, are part of its corporate property. It follows that the interest therein represented by each share is capital and not income, as between life tenants and remaindermen.

PRITCHETT v. NASHVILLE TRUST Co., 96 Tenn. 472 (1895). Samuel Pritchett by will bequeathed certain shares in the Nashville Gas Light Company to the Nashville Trust Company, in trust to

pay over the income to his widow during her life, and after her death to transfer the stock to his son. The gas light company declared, out of its earnings, accumulated since Samuel Pritchett's death, a stock dividend of twenty-five per cent. This suit was brought to determine whether the life tenant or the remainderman was entitled to the dividend. *Held*, had Samuel Pritchett lived, this stock dividend would have been income to him upon his investment in the original shares; he having died, it is, for the same reason, income to his estate, as owner of the same investment. The income of that part of his estate, during her life, was bequeathed to his widow; hence, she as life tenant became the owner of this dividend in as full a sense as he would have owned it.

303. Akin to a stockholder's right to his proportionate share of dividends, when declared by the directors, is his right to subscribe for a proportionate amount of a new issue of stock. He may demand such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares in existence before the increase. Where the right to subscribe for new stock arises in a trust estate, it frequently commands a premium. For instance, if a company's shares are quoted in the market at \$150, and some new shares are to be issued at par, \$100, the right to subscribe at par, for shares which will probably sell afterwards for much more, is quite valuable.

304. When a contest occurs between a life tenant and a remainderman as to the ownership of such subscription rights, most courts decide in the latter's favor. The trustee may sell or exercise the right and the bulk of the trust estate is increased, the benefit thereof going ultimately to the remainderman. But meanwhile, of course, the life tenant may derive some benefit in the shape of an increase from time to time in his income. Maryland, New Hampshire, New Jersey, Pennsylvania, and Tennessee may be regarded as exceptions to the rule set forth in this section as well

as to the rule regarding stock dividends set forth in Section 302.

QUESTIONS

1. What is a dividend? How are dividends usually paid?
2. What is a stock dividend? What circumstances may impel directors to declare a stock dividend rather than a cash dividend?
3. Define a scrip dividend. A property dividend.
4. Does the fact that a company has large surplus profits give a stockholder the right to sue the company for a proportionate part of these profits as a dividend on his shares?
5. The directors of the Galveston Cotton Company declared a dividend of six per cent on the company's stock. Notices of this dividend were sent to the stockholders. At a meeting held two weeks later, it was discovered that certain unexpected and very heavy losses rendered the company insolvent, and the resolution to pay the dividend aforesaid was rescinded. Bemis, one of the stockholders, sued to recover his share of the dividend. Will he succeed in his suit?
6. When will a court compel a board of directors to declare dividends?
7. When, if ever, may dividends be declared out of a company's capital?
8. In your state, are directors liable for declaring illegal dividends? If so, what penalties are inflicted upon them?
9. What must a director who dissents from the payment of an illegal dividend do, in order to escape the penalty imposed upon directors declaring such a dividend?
10. Is there a law in your state requiring directors to pay dividends?
11. May an illegal dividend be recovered back from the stockholders to whom it has been paid?
12. To whom is a dividend usually paid?
13. What is meant by saying stock is sold "*ex dividend*"?
14. Who is entitled to a dividend as between pledgor and pledgee? As between life tenant and remainderman?
15. Stanford devised 100 shares of the New Orleans Artificial Ice Company to be held in trust for his daughter Mary, she to

receive the income during her life. After her death the stock was directed to be transferred to a charity. At the time of Stanford's death, the ice company had surplus profits amounting to \$100,000. Ten years later, when the surplus profits had reached a total of \$400,000, the company declared a one hundred per cent cash dividend, thus distributing the entire \$400,000. Mary Stanford claimed that the entire dividend on the 100 shares of stock should be paid to her as income. The trustee contended that the dividend was principal and should go to the remainderman. How would this question be decided according to the law of your state? What would have been your decision had the directors declared a stock dividend?

16. What is a stockholder's right to subscribe for a new issue of stock by his company?

17. Who has the right to make such a subscription as between life tenant and remainderman?

CHAPTER XVIII

PREFERRED, DEFERRED, AND OTHER EXTRAORDINARY STOCK- HOLDERS

305. The capital stock of a business corporation may be either common, preferred, deferred, guaranteed, or interest-bearing, and the owners of shares are accordingly designated as either common, preferred, deferred, guaranteed, or interest-bearing stockholders. Many of the principles heretofore discussed apply not only to the common stock, but also to the extraordinary or special kinds of stock above enumerated. This chapter will distinguish between these various kinds of stock and point out wherein the rights of the holders thereof differ from those of the common stockholders.

(A) Common stock

306. The most familiar kind of stock is common stock, which entitles the holder to a proportionate division of profits, no stockholder or class of stockholders being usually entitled to any priority over any other stockholder or class of stockholders. When there is only one kind of stock it is generally taken for granted that this must be common stock.

(B) Preferred stock

307. Preferred stock ordinarily entitles the holders thereof to a division of corporate profits before any profits

are distributed among the holders of common stock. In accordance with the contract under which their shares are issued, preferred stockholders may be entitled (1) to priority over the common stockholders in the payment of dividends; or (2) to priority over the common stockholders in the payment of dividends and also in the distribution of capital upon the dissolution and winding up of the company.

308. Preferred stock may be cumulative or noncumulative. Where it is cumulative the holders thereof, if dividends should not be paid on it for a time, are entitled to receive dividends for the years when the company paid them nothing, before the common stockholders can begin to share in profits. For example, if the holder of a preferred cumulative six-per-cent share of \$100 par value is paid no dividend during the first year after it is issued, the company must pay him \$12 at the end of the second year before the common stockholders can get anything. Holders of noncumulative preferred stock, however, are entitled only to a preference over the common stockholders in the payment of dividends for the current year, without allowance for the years when the company has paid them nothing. When it is not specified that preferred stock shall be noncumulative, it will be held to be cumulative.

309. The relation between a corporation and its preferred stockholders is much the same as that existing between the corporation and its common stockholders. A preferred stockholder is not a creditor of the company, but merely one of the associates who has some rights prior to those of the common stockholders. The evidence of the relation existing between the corporation and its preferred stockholders is furnished by their stock certificates, and the special subject of the contract between them is usually the dividends to be paid on the preferred shares. See Section 229 and Chapter XVII.

310. A dividend is usually a distribution out of profits made by a corporation among its stockholders. A preferred dividend is paid to one class of stockholders ahead of that which may be payable to another class. By issuing preferred stock, therefore, a corporation does not absolutely agree to pay dividends thereon, but only agrees to pay dividends thereon out of its earnings before paying dividends on the common stock. But if no profits have been earned by the corporation, the preferred shareholders are no more entitled to dividends than are the common stockholders, and therefore cannot sue the corporation to compel it to pay them anything.

TAFT *v.* HARTFORD, PROVIDENCE & FISHKILL RAILROAD CO., 8 R. I. 310 (1866). Taft owned some stock of the Hartford, Providence & Fishkill Railroad Company, "entitling the holder to preferred and guaranteed dividends equal to ten per cent per annum, payable semiannually." He sued the company to recover eight years' dividends thereon, although he admitted that the railroad had not earned any profits during the period in question. *Held*, the guaranty of a dividend by a railway company means nothing more than a pledge of the funds legally applicable to the purposes of a dividend. In short, it is a dividend and not a debt which is thus preferred and guaranteed. As no profits were earned, there should be no dividend. Taft could not recover.

311. The laws of many states forbid the issue of preferred stock without the consent of two thirds or a majority of a company's stockholders. And where provisions of this kind do not exist, a corporation is in certain states held to lack implied power to issue preferred stock. But a corporation may sometimes assume this power by reserving it in the articles of association or certificate of incorporation, or by adopting appropriate by-laws before subscriptions are received. After subscriptions are received and by-laws adopted, however, a corporation can-

not issue preferred stock without statutory authority or the consent of all its stockholders. The consent of the stockholders may in some cases be implied from their conduct, and if they delay too long in objecting to the issue of preferred stock, they may be left without legal redress.

KENT v. QUICKSILVER MINING Co., 78 N. Y. 159 (1879). The Quicksilver Mining Company had power to issue stock certificates as prescribed by its by-laws. At an annual meeting it was resolved by a majority of shareholders that owners of the company's common stock who should surrender their certificates and pay \$5 a share thereon would be entitled to the same number of shares of preferred stock. This preferred stock was to carry a seven per cent yearly dividend payable out of net profits, the surplus profits to be divided *pro rata* among preferred and common stockholders. The preferred stock was offered to all the shareholders, a large number of whom subscribed. The preferred and the common stock were afterwards publicly dealt in and referred to in the directors' annual reports. Four years later Kent, a common stockholder, sued to set aside the creation of the preferred stock. *Held*, the action of the corporation in dividing its shares into two classes, and giving to one class a preference over the other in the company's earnings, materially and injuriously affected the rights of the latter class. Without their assent or acquiescence it was illegal. But Kent had notice of the issuing of the preferred stock, and having acquiesced in the action of the corporation during four years, must be held to have ratified it and to be bound thereby.

312. The rights of preferred stockholders depend upon the agreement under which their stock was issued. Thus the amount of the dividend to which they shall be entitled is fixed in the agreement. But their contract, while giving them certain priorities with respect to the payment of dividends, may at the same time put them in other respects at a disadvantage as compared with the common stockholders. For example, while they are usually entitled to

vote at corporate elections the same as common stockholders, this right may, in some states, be denied them by the agreement under which their stock is issued.

313. The rights of preferred stockholders with respect to compelling a declaration of dividends by the directors are not usually greater than those of common stockholders. Whether or not any dividends shall be declared, and if so in what amount, rests largely within the directors' discretion. They are not justified in refusing to declare dividends arbitrarily when, in view of all the circumstances, they ought to grant them. But while their action in declaring or refusing to declare dividends is subject to review by the courts, they will not be interfered with unless they are clearly abusing their discretion. See Section 289.

McLEAN v. PITTSBURG PLATE GLASS CO., 159 Pa. 112 (1893). McLean, a stockholder, filed a bill in equity to compel the glass company's directors to declare a dividend on the preferred stock. The certificates set forth that the holders of preferred stock were entitled to dividends out of the net earnings of each year, when declared by the board of directors, to the extent of twelve per cent of the par value of said stock before the payment of dividends to the holders of common stock, but the dividends on preferred stock were not cumulative. It appeared that the corporation had greatly increased its plant, and had thereby incurred large indebtedness. The directors deemed it expedient to apply all the current year's earnings toward paying this indebtedness. The liabilities of the company in bonds, notes, and accounts payable were almost double the amount of its quick assets. *Held*, under the circumstances the discretion of the directors had been properly exercised. McLean was not entitled to relief.

314. Whether or not preferred stockholders are entitled upon their company's dissolution, and the distribution of its assets, to payment of their principal before the common stockholders can share in the fund, depends upon the contract under which their preferred stock has been issued.

In the absence of an express rule of law forbidding such priority, a provision giving it to preferred shareholders may be validly inserted. But preferred stock cannot, by agreement between the corporation and the shareholders, be given a lien on the corporation's property, as against bondholders or general creditors without notice of such agreement.

CONTINENTAL TRUST CO. OF NEW YORK v. TOLEDO, ST. L. & K. C. R. Co., 72 Fed. 92 (1896). Charles Hamlin, for himself and other preferred shareholders of the Toledo, St. Louis & Kansas City Railroad Company, claimed to have a lien on property to be sold under foreclosure proceedings and asked the court to make the owners of preferred stock parties to the litigation, so that their rights as lienholders might be fixed. *Held*, the preferred stockholders could not be made parties to the suit. The corporation had no power to constitute the owners of preferred stock lienholders, so as to give them a priority over general creditors and bondholders. The latter are not bound by such an agreement of which they have not been notified.

(C) Guaranteed stock

315. The term "guaranteed stock" is sometimes used synonymously with preferred stock, or the stock may be called "preferred and guaranteed." See Section 310. There is virtually no difference between the two kinds of shares.

316. The holders of guaranteed stock are not usually entitled to dividends whether profits are earned or not, but, like cumulative preferred stockholders, may generally collect arrears of dividends before common stockholders are allowed to participate in the company's earnings.

(D) Interest-bearing stock

317. A corporation may also issue interest-bearing stock. This is much like ordinary preferred stock. Interest divi-

dends are usually paid only out of the surplus earnings not needed for the payment of the debts of the corporation and the prosecution of its business. This does not interfere with the rights of creditors or contravene any principle of public policy.

(E) Deferred stock

318. Deferred stock is much like common stock. The name often indicates that class of stock on which no dividends are paid until payment of dividends is made on some other kind of stock, as, for instance, preferred or guaranteed stock.

319. Sometimes, however, deferred stock is issued by a company which already has a quantity of outstanding common shares and perhaps a number of preferred shares also. In such cases the deferred stockholders constitute an extraordinary class by themselves, and are subordinated even to the common stockholders to the extent provided for by the agreement.

QUESTIONS

1. What kinds of stock may a business corporation issue? What is common stock?
2. What is cumulative preferred stock?
3. Are holders of preferred stock entitled to dividends when the company has been run at a loss?
4. Define a dividend.
5. The directors of the Waseuka Mining Company voted to issue \$25,000 of preferred stock bearing a five-per-cent cumulative dividend. The stock was issued and subscribed for chiefly by the directors themselves. Watson, one of the common stockholders, brought suit to have the issue of preferred stock declared void, contending that the consent of the common stockholders had not been given to the issue of the preferred stock. Will Watson win his suit?
6. Have preferred stockholders any greater right to compel the payment of a dividend than common stockholders?

7. Have preferred stockholders ever a lien on the company's assets?

8. What is guaranteed stock?

9. Wilson held seven shares of interest-bearing stock in the Providence Manufacturing Company. For three years the company paid him nothing, so Wilson sued the company for the amount called for on the face of his stock. The company proved that for more than three years it had made no profits. Who wins?

10. What is deferred stock?

PART FIVE

CLAIMS AGAINST CORPORATIONS

CHAPTER XIX

THE LIABILITY OF CORPORATIONS FOR TORTS AND CRIMES

320. The word "tort" is taken from the French language. Primarily it means "a wrong." Although difficult to define with scientific precision because of the infinite variations of circumstance, a tort may be described as an injury to an individual person or corporation inflicted otherwise than by a breach of contract. For instance, when an automobile is recklessly driven along a crowded street and runs down a passerby, the latter, if he has not contributed to produce the accident by his own carelessness, has a cause of action arising out of the tort which has been committed. This particular tort is called negligence, and there are a number of other torts, some of which are mentioned in Section 329.

321. Roughly speaking, most acts or omissions which the law will notice may be classed under three heads: contracts, torts, and crimes. Contracts include agreements and injuries arising from the breach of them, torts include other injuries to the individual, while crimes include injuries to the public, the commonwealth.

322. Although torts are distinguished from crimes in that a tort is a wrong (arising otherwise than by breach of contract) done to an individual, while a crime is a violation of a duty owed to the whole community, it is to be observed that in some cases the same state of facts involves both a tort and a crime. If, for example, one

man strikes another, the man struck may have his civil suit against the aggressor for the tort because it injures him individually; the state may also proceed criminally against the aggressor for his violation of the public duty of keeping the peace. Corporate liability as to torts and as to crimes will be treated separately.

(A) As to torts

323. Under the earlier legal theories it was thought that a corporation was incapable of committing a tort. The reasoning upon which this conclusion was based ran along the following lines: A corporation is an artificial person having certain powers more or less definitely granted to it by its charter, outside of which powers it may not act; of course no charter would be granted authorizing the commission of a tort; therefore the commission of a tort is beyond a corporation's power. The injustice resulting from such theorizing has caused it to be rejected. The courts now hold that there is no reason why a corporation should not be as much responsible for the torts of its officers or employees (within the limitations to be laid down in this chapter) as is a partnership for the torts of its agents.

324. Accordingly, the general rule now in force is that a corporation may be held liable in damages, just as is a private person, for wrongs committed by its agent, provided the agent is acting within the general scope of the corporation's powers and also within the general scope of the power delegated to him by the corporation.

CRAKER v. CHICAGO & NORTHWESTERN RAILWAY Co., 36 Wis. 657 (1875). Craker, a young lady traveling on the defendant company's train, was hugged and kissed, without her consent, by the conductor, whom she had never seen before. She sued the company. *Held* that as the company owed the passenger protection from insult, it was responsible for the violation of that duty.

CHESAPEAKE & OHIO RY. Co. v. HOWARD, 178 U. S. 153 (1900). Howard's wife suffered injuries while traveling on a train of the Chesapeake & Ohio Railway Company, conducted by its agents. The car in which she was riding ran off the track and down a bank in consequence of a defect in one of the wheels. This defect might have been previously discovered and remedied by the company had it properly inspected the wheel. In a suit against the company, *held*, since the defendant, through its agents, managed and controlled the train to which the accident happened, it would be responsible for that accident.

325. The proviso that, in order to hold a corporation liable for a tort, its agent must have acted within the scope of the corporation's powers, is clearly a just one. This is only an example of the general principle underlying all corporation law, that outside the scope of the purposes of its creation, a corporation is without power to act. If it attempts to do something beyond its charter powers, its attempt is regarded in law as ineffectual. The charter giving a corporation its powers being recorded publicly, the public is supposed to have notice of the limits beyond which the corporation may not go. See Chapter VI.

MILLER v. BURLINGTON, ETC., R. R. Co., 8 Neb. 219 (1879). Miller sued the defendant company, alleging that Nat Brown, the defendant's agent, had falsely and maliciously sworn out a warrant for the plaintiff charging him with burglary. The grand jury had refused to indict Miller, and he claimed damages for malicious prosecution. *Held*, since it did not appear that Brown had acted within the scope of his employment as the defendant's agent, or that the offense charged was committed in connection with the transaction of the corporation's business, the defendant was not liable in damages.

GUNN v. CENTRAL RAILROAD & BANKING Co. AND SAMUEL WHITESIDES, 74 Ga. 509 (1885). The defendant company agreed to enter into partnership with Whitesides for the purpose of running

a line of steamboats. Boats were put in operation; and one of them, wherein Gunn was a passenger, was wrecked. Gunn sued the alleged partners to recover for personal injuries caused by the careless running of this boat. *Held* that the corporation lacked power to become a partner. As its contracts and other acts pertaining to the business of the alleged firm were invalid, it was not liable as a partner for Gunn's injuries.

326. The other qualification of a corporation's liability for a tort committed by its agent, namely, that the agent must be acting within the scope of the power delegated to him by the corporation, arises from the broader principle of agency law that a principal cannot be held liable for the acts of his agent when the latter exceeds his authority. Although the reason of this rule is clear enough, its application raises difficulties. A corporation may not escape liability for the tort of its employee by contending in a given case that although this employee was engaged to do the work out of which the commission of the tort arose, still he did it in "an unauthorized manner" or "exceeded his instructions in doing it." It is not going too far to say that if an agent is acting within the general scope of his work, even if he oversteps his orders or misexecutes them, the corporation which employs him to do such work is liable for a tort committed by him thereby. Yet very properly the corporation is not liable for a tort committed by its agent in the accomplishment of some outside purpose of his own.

NEW YORK, LAKE ERIE & WESTERN RY. CO. v. HARING, 47 N. J. L. 137 (1885). The driver of a horse car belonging to the defendant railroad company had a right to expel Willie Haring on account of his intention to ride without paying his fare. But the driver put Haring off so rudely and violently as to cause him serious injury. Haring sued the company. *Held*, the company was liable for the damage needlessly done to Haring in the course of such ejection.

WASHINGTON GAS LIGHT CO. *v.* LANSDEN, 172 U. S. 534 (1898). Lansden sued the Washington Gas Light Company for an alleged libel which he claimed the defendant caused to be published concerning him. It was shown that the company's general manager, who actually wrote the letters of which plaintiff complained, was not authorized to do so. *Held*, as the illegal act was not performed in the course and within the scope of the agent's employment in the business of the defendant, it was not liable.

327. Under another general principle of agency law, a corporation is not liable for the torts of an independent contractor. The distinction between an agent and an independent contractor is that in the case of an agent the principal reserves power in himself to control the methods and conduct of the work for the doing of which the agent is employed, while an independent contractor is free to choose his methods and to engage and direct his employees, being responsible to his principal merely for the production of finished results.

CUNNINGHAM *v.* INTERNATIONAL RAILROAD CO., 51 Tex. 503 (1879). Cunningham sued the defendant railroad company to recover damages for personal injuries suffered by him while a passenger on the defendant's line. The defense was that the section of the road upon which the accident occurred, as well as the train on which the injuries were received, were then in the exclusive possession and control of certain persons who had contracted with the defendant to construct that portion of the road. Also that the train in question was at the time being operated for the sole benefit of such contractors and not by the defendant's employees, and was not open for the transportation of passengers. *Held*, as the portion of road on which the accident occurred was still under the construction company's control and had not yet been turned over to the railroad company, the defendant was not liable.

FULLER *v.* CITIZENS' NAT. BANK, 15 Fed. 875 (1882). The defendant bank let the work of excavating a vault in front of its building to David Tamlyn. Fuller, when attempting to pass the property, fell into the excavation and was injured. He sued the

bank for negligence. The defendant argued that it had no immediate part in the digging of the vault, except to furnish most of the materials, and that therefore it was not liable for Tamlyn's negligence. *Held*, as the defendant reserved control of the place of the excavation and the right to direct the construction of the work, Tamlyn was a mere agent of the bank, which was liable for his negligence.

328. In this connection one should further observe that a corporation may by ratification make itself liable for a tort of its agent for which it would not otherwise have been held responsible. This ratification may be made by an unanimous vote of approval of its stockholders or by the action of its authorized agent. An agent of a corporation, who ratifies for it an act upon which it may be held liable in damages, must have, as between himself and the corporation, the authority to ratify. But no mere implied ratification or ratification by inaction is sufficient to impose such liability. The ratification must be express and unequivocal.

SAN ANTONIO, ETC., R. R. CO. *v.* GRIER, 20 Tex. Cir. App. 138 (1898). Grier sought to recover damages from the railroad company because it had fenced up a right of way through his lands, so as to cut off his cattle from water and grass. The defendant's roadmaster had failed to make such an opening in the fence for Grier as he was entitled to have. *Held*, the roadmaster was the defendant's representative in building the fence, and the company was therefore liable.

MALECEK *v.* TOWER GROVE & LAFAYETTE R. CO., 57 Mo. 17 (1874). Malecek, a passenger on a street car belonging to the Tower Grove and Lafayette Railway Company, was accused of not depositing his ticket in the ticket box and was brutally assaulted by the driver of the car. Later Malecek complained to the superintendent of the company, but he justified the driver's action. Malecek sued the company to recover for his injuries. *Held*, the language of the superintendent, admitting and justifying the driver's assault, bound the company.

NIMS v. MOUNT HERMON BOYS' SCHOOL, 160 Mass. 177 (1893). The defendant was an educational corporation. Nims sought to recover damages for an injury received by him through the negligence of a ferryman in managing a boat on which he was a passenger. The defendant was using this boat at a public ferry in the business of carrying passengers for hire. *Held* that as the defendant while running the ferryboat accepted Nims as a passenger to be transported for hire, it was liable in tort for neglect of the duty to carry him safely, although the right to run a ferry was not granted by its charter. Also, it was not necessary for the corporation to ratify the acts of its agents in establishing and maintaining this ferry by a formal vote, if the corporation, acting through its managing officers, and knowing that the business had been done by those who assumed to act as its agents therein, and that the income of the business had been received and the expenses paid by its treasurer in his official capacity, had adopted the action of its treasurer and chosen to keep the money so received.

329. In accordance with the principles just stated (and for reasons of public policy), corporations have been held liable in damages under the proper circumstances for the commission of such torts as a trespass upon property, assault and battery, the publication of a libel, malicious prosecution, false imprisonment, conspiracy, fraud, negligence, and maintaining a nuisance. Moreover, although it was formerly questioned whether a corporation might be held liable to pay punitive damages for violation of a statute imposing a penalty, it is now generally recognized that this may be done.

COPLEY v. GROVER & BAKER SEWING MACHINE Co., 2 Woods (U. S.) 494 (1875). Copley sued the defendant corporation to recover damages for a malicious prosecution. He alleged that the defendant had, maliciously and without reasonable grounds, caused a warrant to be issued for his arrest, charging him with embezzlement. Copley had been tried and acquitted. The defendant argued that a corporation, being an impersonal creature of the law, cannot harbor malice. *Held*, the defendant was liable for the

conduct of its agents in prosecuting Copley, if in so doing they were seeking to serve the defendant and acting within the general scope of their powers.

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* WHITMAN, 79 Ala. 328 (1885). Whitman, having purchased a ticket to a certain destination on the line of another railroad, by mistake entered a train of the Louisville & Nashville Railroad Company and was ejected by its employees while the train was moving. He was thrown violently to the ground and sustained serious injuries. In an action by Whitman to recover for them, the company did not deny that Whitman was put off the train while it was moving, but alleged that as a corporation it was not liable in punitive damages. *Held*, the rule for punitive damages against corporations for abuse by their employees of the duties confided to them is the same as that which applies to natural persons who are guilty of similar misconduct. Whitman won.

(B) As to crimes

330. In examining whether or not a corporation may be found guilty of a crime, a distinction must be drawn between crimes which involve malice or criminal intent and crimes which do not. With the same qualifications that are applicable to the liability of a corporation for the tort of its agent, a corporation may be held liable for its agent's crime, provided the crime is one not necessarily involving malice or criminal intent. Such motives may not legally be imputed to a corporation.

CRALL *v.* COMMONWEALTH, 103 Va. 855 (1905). The L. B. Price Mercantile Company did a peddling business through the medium of unlicensed agents. The state brought an information against the company for peddling without first having obtained a license as required by statute. *Held*, the corporation could be punished criminally for peddling by means of unlicensed agents.

331. In the case of a crime whereof malice is an essential factor, even if all the members of a corporation har-

bor malice and criminal intent and join in committing the act alleged to be a crime, yet the crime is the individual crime of each member. It is not deemed in law the act of the corporation, and the corporation should not be punished for it.

332. Corporations have been held liable for such crimes as creating or permitting a public nuisance (for instance, an obstruction to a highway or to navigation or a failure to keep their works in repair), selling goods on Sunday, collecting usurious interest, and doing business without a license.

TELEGRAM NEWSPAPER Co. v. COMMONWEALTH, 172 Mass. 294 (1899). Proceedings had been brought against a town for the assessment of damages caused by the town's taking certain land. The case was on trial at the time some articles relating to it were published in the defendant company's newspaper. The court found that these articles were calculated to obstruct the course of justice in the trial of the case, and instituted proceedings against the newspaper company for contempt. *Held* that a corporation may be indicted for a wrong committed as well as for a failure to discharge a duty. The publication of the articles was a contempt of court and the company was liable to be fined.

STATE v. RAILROAD, 91 Tenn. 445 (1892). A railroad corporation was indicted for obstructing a public road by permitting its train to stand across the road an unreasonable length of time. *Held*, the corporation was criminally responsible for the acts of its employees done within the scope of their duty, though a rule of the corporation forbade its employees to let trains stand across a public road in such manner as to obstruct travel for more than five minutes.

333. On the other hand, generally speaking, a corporation cannot be indicted for an assault and battery, or for treason or the commission of a felony.

QUESTIONS

1. Define a tort. Distinguish a tort from a crime.
2. Upon what grounds was it formerly held that a corporation could not be liable for torts and why was this rule abandoned?
3. Jenkins is a conductor on the Chicago and Western Railway. When his train stopped at one of the stations along his route he assaulted a man, against whom he had a grudge, on the platform. The company was sued for this assault. Will the plaintiff succeed?
4. May a corporation be held liable for acts of its agents done outside their instructions but within the general scope of their duty?
5. What is the distinction between an agent and an independent contractor?
6. May a corporation ratify a tort of its agent so as to make itself liable therefor to the injured party?
7. The Evening Journal Association was a corporation engaged in the publication of a daily paper in the city of Trenton. A libel on James McDermott was published in the paper and McDermott sued the Evening Journal Association. The defense was that a corporation had no soul and could not be guilty of malice. Is this defense a good one?
8. Can a corporation be convicted of crimes not involving malice? Of crimes involving malice?
9. Give examples of crimes of which a corporation may be found guilty and of crimes of which a corporation cannot be found guilty.

CHAPTER XX

UNSECURED AND SECURED CREDITORS

(A) Unsecured creditors

1.—RIGHTS AS AGAINST THE CORPORATION

334. The liability of a corporation for its agents' torts having been treated in the preceding chapter, let us glance at the rights and remedies of a creditor whose claim against a corporation arises out of contract. The liability of a corporation on its contracts is the same as the liability of an individual on his. But see Chapter VII. As a corporation is a legal entity, separate and distinct from its stockholders, the latter usually have nothing to do with the corporation's liability.

335. When an unsecured creditor believes that he has a valid claim against a corporation which refuses to pay it, he may take legal steps, by an action at law or in equity, to obtain the judgment of a competent court. If the judgment of the court is in his favor, he then has a "judgment" claim. A judgment debt is virtually the same whether the judgment has been obtained in an action of contract or of tort.

336. If the corporation still refuses to satisfy the judgment, the judgment creditor may issue a writ of execution to subject its assets to the satisfaction of the debt. Generally speaking, all the property of a corporation, including real estate, tangible personal property, debts due the cor-

poration, etc., is subject to such execution. But in the absence of special statutory provision, the corporate franchises or those assets which are necessary to the carrying on of a semipublic corporation's business may not be seized to satisfy a judgment. Moreover, an unsecured creditor cannot impair the rights of one who has duly obtained security for his claim.

2.—RIGHTS AS AGAINST TRANSFEREES OF THE COMPANY'S PROPERTY

337. If a writ of execution issues, but there is not enough property belonging to a corporation to satisfy the judgment of a creditor, the latter is, as a rule, left without redress. He is in much the same position as the creditor of an individual debtor who lacks property. Certain circumstances, however, may be discovered, or statutory provision may exist, which will enable a judgment creditor to satisfy his claim, not against the corporation, but through it and against third parties.

338. If a debtor disposes of his property for the purpose of preventing or hindering his creditors from satisfying their claims, an aggrieved creditor may file a bill in equity to set aside the transaction. And any person who has received such property, either without paying a sufficient consideration for it, or with intent to aid in the fraud, must render it up to satisfy the debts which it should go to pay. However, the rule does not apply against a person who has purchased property from a debtor for a valuable consideration and without knowledge of fraud.

SYMONDS v. LEWIS, 94 Me. 501 (1901). The Richards Paper Company became indebted to Galen C. Moses, who was one of its directors and its treasurer. In 1898 the paper company became hopelessly insolvent, and executed what purported to be an absolute bill of sale to Moses, but what was really a collateral security for his preëxisting claim. The bill of sale covered practically all the

company's property, which was worth about \$94,000. Lewis, who represented other creditors, took possession of the property to satisfy their claims, and Symonds, who was Moses's assignee, sued to compel Lewis to turn over the property to him. *Held*, the conveyance to Moses was invalid as to the company's other creditors. A director of an insolvent corporation must not take a conveyance of its property and leave nothing for the remaining creditors.

MONTGOMERY WEB CO. *v.* DIENELT, 133 Pa. 585 (1890). The Aronia Fabric Company, being largely indebted, made an agreement with its creditors, excepting Dienelt, whereunder a new corporation, the Montgomery Web Company, was formed. These creditors of the old corporation were paid part of their claims in cash and the balance in stock of the new concern. The remainder of the said stock, more than half thereof, was distributed among the stockholders of the old corporation. Dienelt obtained judgment against the Aronia Fabric Company and claimed the right to satisfy his claim out of the property which had been transferred to the Web Company. *Held* that Dienelt could do so, for the transfer was a fraud upon him, being largely, in effect, a transfer to the stockholders of the Aronia Fabric Company.

339. This right does not exist in favor of every creditor of an insolvent corporation. A conveyance by a corporation made without intent to defraud, before a given creditor's claim accrued, is quite valid and does not wrong the subsequent creditor. In such case the creditor is presumed to have contracted upon the basis of the company's present financial ability, and the prior conveyance does not operate to diminish its assets.

340. Nor does every conveyance of an insolvent corporation amount to fraud even on existing creditors. An insolvent corporation may very well sell or mortgage its property for a valuable consideration, and commit no fraud, despite the fact that it is beset by many creditors. Otherwise, great inconvenience would result, for as soon as a corporation should become insolvent it would cease

to have a right to convey its property. Moreover, one must remember that the consideration received by a company under the sale or mortgage takes its place among the assets of the corporation in lieu of the property disposed of, no actual damage being done to creditors. Fraud is committed only when a creditor is deprived of his satisfaction.

GRAHAM v. RAILROAD Co., 102 U. S. 148 (1880). In 1855 the LaCrosse Railroad Company sold certain property to Charles D. Nash for \$25,000. The company's officers, Moses Kneeland and others, who took a leading part in the transaction, were interested in the purchase. Nash immediately afterwards turned over the property to Kneeland and his colleagues. In 1858 Graham obtained judgment against the LaCrosse Railroad Company on a claim which arose after 1855. Then the company being insolvent, Graham filed a bill in equity against Kneeland and the others to have the conveyance of the land to them set aside on the ground that it was a fraud upon creditors. *Held*, Graham, being a subsequent creditor, could not question the validity of the transaction.

3.—RIGHTS AS AGAINST THE STOCKHOLDERS

341. When a person subscribes to capital stock he usually promises in effect to pay the corporation the full price represented by the par value of the stock he is to take. See Chapter XII. But when a corporation is being organized, the subscribers often pay in only a portion of their subscriptions. With the portion so paid in the corporation starts its business, and in many cases is prosperous enough not to require payment of the balance of the subscriptions.

342. The corporation, however, has a right under the subscription contracts to call upon the stockholders to pay the balance of the unpaid stock. This contractual right of the corporation to make "calls" on the stockholders to pay unpaid stock is an asset which may be used by

creditors in satisfying their demands. When a corporation becomes insolvent and there is no property to pay its creditors, the latter may then go against the stockholders and subject the unpaid subscriptions to the satisfaction of their claims.

ADDISON v. PACIFIC COAST MILLING Co., 79 Fed. 459 (1897). E. A. Ayerst was a subscriber to the stock, and one of the principal promoters, of the Pacific Coast Milling Company. Upon the incorporation of the company, he received half its capital stock of the par value of \$25,000. The only consideration paid for the stock was \$5,000, although the stock was marked full paid. Ayerst was the manager of the company, and when it became insolvent he presented to the receiver a claim for work done by him. *Held*, as to creditors the transaction could not be sustained. Ayerst's liability on his subscription greatly exceeded his credits for work as manager. His claim was therefore disallowed.

343. As a rule, the creditors of an insolvent company do not proceed by their own individual suits to enforce claims of the corporation. Such practice would multiply lawsuits, and result in an unequal division of the company's assets. Usually the rights of the various parties are worked out through the medium of a receiver or trustee who should look after the welfare of the company and the various parties concerned therein. See Chapters XXI and XXII.

344. Sometimes a corporation executes to its stockholders a release of its right to make calls on their unpaid stock. Even though the release is given for an inadequate consideration, it is nevertheless usually binding on the corporation itself in the absence of fraud. The corporation has no further right to make calls.

345. But suppose the concern is insolvent. What are the rights of its creditors? In solving this problem, the courts have held that, although such release is binding on the corporation, it is a fraud upon creditors who have

contracted with the corporation in the belief that the stockholders have paid their subscriptions in full. Of course, if a creditor, when he contracts with a corporation, has notice of a release or of other circumstances affecting the corporation's right to make calls, there is no fraud upon him, and he may have no claim against the released stockholders. But in many states laws have been passed requiring the stockholders to pay in a certain percentage of the capital stock at the time of organizing, and providing that they shall be liable to the company's creditors for the balance. Under such statutes stockholders are usually liable in all events, whether or not the creditors had notice that anything remained due by them.

CARTER *v.* UNION PRINTING CO., 54 Ark. 576 (1891). The Union Printing Company was a corporation with a capital stock of \$30,000. F. L. Munroe and Van Valen subscribed for \$15,000 and A. McMurtry for the remainder. The latter paid only a portion of his subscription, promising to pay the balance on call. Subsequently the company released McMurtry from the payment of the balance. *Held* that such a release was fraudulent as to creditors, and that the defendant was liable for the amount of the subscription.

346. Likewise, if a corporation distributes some of its property among its stockholders by means of unauthorized dividends which impair its capital, and the assets left are not enough to meet its debts, a judgment creditor may usually pursue the funds improperly paid into the hands of the stockholders so as to satisfy his claim.

BARTLETT *v.* DREW, 57 N. Y. 587 (1874). Bartlett recovered a judgment against the New Jersey Steam Navigation Company; but when he attempted to collect it, he could find no assets belonging to the company. Bartlett then sued Drew, a stockholder, alleging that several years previously the board of directors of the navigation company had sold some of its property and illegally distributed the proceeds among the stockholders and that Drew received for his share an amount much larger than the plaintiff's judgment. *Held*,

Drew was liable for the debts of the company to the extent of the money thus improperly paid to him. Bartlett won.

347. One of the means which may be adopted by a corporation to raise money is by issuing new stock. Stock so issued, if sold on the market for what it will bring, is sometimes disposed of for less than its par value, but marked full paid. Some courts, in order to encourage corporations to keep on their feet, have recognized this as a legal way of raising money and not of itself fraudulent. Therefore, in such jurisdictions when a corporation, which has so issued stock, becomes insolvent, its creditors are not allowed to hold the new stockholders for the difference between the market price of their stock and its par value.

HANDLEY v. STUTZ, 139 U. S. 417 (1890). The Clifton Coal Company, in order to raise money, made a bond issue. It was found impossible to sell the bonds unless the purchasers were given shares in the company as a bonus or inducement. The coal company then issued 500 shares of its capital stock, and the bonds and stock were placed upon the market for what they would bring. Handley was one of the purchasers. The price he paid for his stock was below the par value thereof, but was its fair market value. The coal company failed, and Stutz, one of its creditors, attempted to hold Handley for the difference between the par value of his stock and the price he had paid for it. *Held*, Handley was not liable. An active corporation, in order to raise money, may usually sell stock for its market value, unless the local constitutional or statutory law forbids.

348. If a corporation issues capital stock, agreeing to accept payment from the purchasers thereof in property or services, and the transaction takes place upon the basis of a fair valuation of such property or services, the purchasers of the stock hold it as full paid. But where the property or services are plainly worth much less than the market value of the stock, it has been held that fraud is perpetrated on the company's creditors. The latter may

go against the original holders of the stock for the difference between the appraised value of the property or services and the value of the stock.

349. But this rule does not apply where the overvaluation is honestly made. For instance, the mere fact that a mine in settlement for which millions of dollars of full-paid stock have been issued, turns out to be worthless does not necessarily render the recipients of such stock liable to the company for the par value thereof. It is usually assumed that those who represent a company in buying property for it are faithful to their trust. If no conspiracy between the company's representatives and the sellers of the mine is proved, the transaction stands, and the stock must be regarded as really full paid.

350. By reason of the negotiability of corporate stock many changes take place in the ownership thereof. Questions often arise as to who is liable for unpaid stock which is fraudulently marked full paid. Generally speaking, the original holders are liable. The liability of transferees depends upon whether or not they took the stock with knowledge that it was not full paid. *Bona fide* purchasers of such stock are not liable, because they are not parties to the fraud. But where transferees have notice of the fraud, they are liable for the balance due the company on their stock.

4.—STATUTORY AND CHARTER LIABILITY OF STOCKHOLDERS

351. As a general rule, when a stockholder has paid in full his share of the stock subscription, he is liable no further to the creditors of the corporation. But in a number of states this rule has been considerably modified by statutes which, in certain cases, attach to stockholders a liability for corporate debts in addition to the amounts of their stock subscriptions. Sometimes the charter of a corporation regulates the liability of stockholders.

352. Unlimited liability of stockholders, although seldom met with, may be provided by statute or the corporate charter. In California, stockholders are liable for corporate debts in the proportion that the par value of the stock owned by each bears to the par value of all the corporate stock. In Arizona, stockholders are unlimitedly liable for all the corporate debts, unless their liability is restricted by the corporate charter.

353. An act of Congress provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." This is a fair example of statutes which have been passed in many states, and have been extended to various kinds of corporations. Under the laws of Massachusetts, New York, Pennsylvania, and several other states, the stockholders of many corporations are liable to the amount of the stock held by them respectively for debts due by their companies to workmen.

354. A number of states have passed laws imposing a liability on stockholders in the nature of a penalty. Thus, statutes in New Hampshire, New York, and a few other states fasten an unlimited liability on shareholders of certain corporations, until they have fully paid up all their corporate stock subscriptions, and a certificate thereof has been filed of record. Other statutes provide that stockholders shall incur an additional liability for failure to incorporate properly, to file annual statements, etc. It is sometimes very important to decide whether a statutory liability is contractual or penal; for if it is penal it is not enforceable in a foreign jurisdiction, and it expires with the death of the stockholder. Otherwise, if it is contractual.

(B) Secured creditors

355. Generally speaking, a secured creditor is one whose claim is wholly or partially protected against the debtor's becoming insolvent by reason of a charge or lien upon certain property. The most usual form of security is that known as a mortgage. In order fully to understand what follows, let us see what a mortgage is. Ordinarily, when a person makes a mortgage, he conveys certain property, real or personal, to his creditor upon the express condition that if the debtor within a certain time repays to the creditor the money owed, with interest, etc., the latter will reconvey the property to its original owner, the debtor. The mortgage deed usually provides that the debtor shall, during the continuance of the mortgage, pay interest upon the amount of the debt; and also that if the debtor fails to pay the interest, the creditor may foreclose the mortgage.

356. A corporation, in exercising its power to dispose of its property, may, as a rule, mortgage its property to secure creditors. Where a corporation is in need of money it may borrow it, just as may an individual, and in order to secure the lender, it may usually give a mortgage on its property. Corporation bonds and mortgages are usually very complex instruments, and the rights and obligations of the respective parties thereunder now occupy a prominent place in the law of corporations.

1.—NATURE OF BONDS ISSUED BY COMPANIES

357. A corporate bond is generally a sealed instrument whereby a corporation binds itself to pay to the registered holder, or to the bearer thereof, if it is unregistered, a certain sum of money at a specified time with interest. The bond may state that it is one of a series of bonds all protected by a transfer of certain property to a third party, called a trustee, who takes title to this property for the benefit of the bondholders.

2.—ISSUE OF THE BONDS

358. When a corporation wishes to raise money by the issue of bonds, it usually executes a number of instruments of the description given above. These bonds are issued in a group or series. Although, like shares of stock, they have on their face a par value, they are generally sold for what they will bring. Many states have passed laws providing that bonds shall be issued for money, labor, or property, only. The consideration price, moreover, whether it is money, property, or labor, must not be appreciably below the market value; otherwise the validity of the bonds may be open to contest, in certain cases, on the ground of fraud. A few states expressly forbid bonds to be issued at a discount.

359. Usually, where bonds are issued in a series, the certification of the trustee is necessary to render a bond valid. This is to prevent an overissue of bonds which would hurt not only the corporation, but the bondholders themselves.

3.—NEGOTIABILITY OF CORPORATION BONDS

360. Corporate bonds are usually made payable to "bearer," and are held to be negotiable. Each bond is numbered and it is usually provided in the instrument that the holder may register his name as owner on the company's books, and that if this is done the principal shall be payable to the registered holder only.

4.—INTEREST

361. In the bond the corporation usually agrees to pay interest quarterly or half yearly. Attached to most corporate bonds are a number of severable coupons, each one calling for the payment at a certain date of an installment of interest. Coupons are usually made payable to bearer,

and are negotiable independently of the bond, and whether or not it is registered.

362. In order to obtain payment of a coupon the holder must surrender it to the party designated in the coupon itself. This is ordinarily accomplished by the holder's depositing it with his bank, which forwards it to the proper place for collection. For a form of coupon most usually met with, see Section 371. Bonds without coupons are usually registered, and interest is payable to the registered holder by check.

5.—PRINCIPAL

363. The corporation usually binds itself to pay the the principal at a certain time. Many bonds are payable after twenty or thirty years, although some extend for a much longer period. At the time specified for payment the principal is said to have "matured."

364. It is sometimes provided in a bond that the corporation may redeem it before the date of maturity by paying off the principal with any interest accrued to the time of actual redemption. A distinction may therefore be observed between the time when the principal is due and the time when the bond is redeemable. The principal is due if the corporation must pay; the bond is redeemable if the corporation may anticipate the date of maturity and thereby clear itself of its bonded indebtedness.

365. Most agreements securing corporate bond issues provide that if the corporation fails to pay any installment of interest within a certain time after it is due, the principal shall immediately mature. Likewise, a breach of any of the corporation's other promises for the bondholders' protection, such as a promise to pay taxes on property pledged to the trustee, often operates, under the terms of the agreement, to mature the principal of the bonds.

6.—THE SECURITY

366. The security afforded to bondholders is usually given by means of a mortgage or deed of trust. When a corporation issues a series of its bonds, it usually makes at the same time a deed conveying some or all of its property to a third party, the trustee, who holds the property in trust for the benefit and security of the bondholders.

367. Where many pieces of property are conveyed by a deed of trust, one should provide for the possibility that the company may find it desirable later on to dispose of some of the property thus conveyed. Usually this is done by a clause stating that the corporation, with the trustee's consent, may still freely dispose of the property. The trustee is under an obligation to withhold his assent to any disposition of the property which will prove injurious to the bondholders, but may allow it to be transferred free of the trust upon condition that the proceeds of such transfer are used either to buy further securities for the bondholders or else to redeem some of the bonds.

368. A question frequently arises as to what property of the corporation is covered by a deed of trust. The answer depends upon the intention of the parties, usually expressed in the deed of trust itself. But if the extent of the charge is not specifically provided in the deed, the intention of the parties must be gathered from surrounding circumstances. This rule of construction has led some courts to hold that the charge extends to all the corporate property; not only that owned at the time the bonds are issued, but also property acquired subsequently.

7.—REMEDIES OF BONDHOLDERS

369. If the corporation fails to pay interest, or principal, when it is due, a bondholder sometimes has two remedies: First, he may sue in an action at law on the

bond to recover what is due him; second, he may compel the trustee to foreclose the mortgage on the corporate property. The latter remedy is by no means universally afforded to a single bondholder. Recent decisions in a number of states hold that a majority of the bondholders is necessary to compel the trustee to foreclose, unless the terms of the mortgage agreement provide otherwise. And the agreements under which most series of bonds are now issued require all remedies to be worked out by the trustee in order to secure equality among the bondholders.

370. When the corporate property is being subjected to the claims of bondholders, all the bondholders of the same series are entitled to share equally. If there be more than one series, then the claims of the bondholders of the series which is prior in lien, must be fully satisfied before the bondholders of a subsequent series have any right to participate in the security.

371. The following is a specimen mortgage securing a bond issue. In the mortgage itself appears a form for the bonds to be issued thereunder, and also a form for the various coupons which will be attached to these bonds.

THIS INDENTURE made this First day of May, 1905, between the High Street Elevated Passenger Railway Company, a corporation organized and existing under the laws of the State of Pennsylvania, party of the first part, hereinafter called Railway Company; The Dubois Rapid Transit Company, a corporation also organized and existing under the laws of the State of Pennsylvania, party of the second part, hereinafter called Rapid Transit; and The Iron City Trust Company, a corporation also organized and existing under the laws of the State of Pennsylvania, party of the third part, hereinafter called Trustee.

Whereas Railway Company is a corporation with an authorized capital of ten million dollars organized under the Act of the General Assembly of Pennsylvania entitled "An Act to provide for the incorporation and government of passenger railways either elevated or underground or partly elevated and partly underground with surface rights," approved June 7, 1901, and thereby duly authorized to construct, maintain and operate an elevated and underground

passenger railway and for the purpose of constructing and equipping said road to borrow money in such amount as its stockholders may authorize not exceeding the amount of its authorized capital stock and to execute a mortgage upon its property and franchises to secure the bonds issued thereunder; and

Whereas in order to provide means toward the construction and equipment of its main line from its western terminus in Finley County near the intersection of the Haddington road with the Philadelphia and West Chester Turnpike road to its eastern terminus in Boulder County at or near Delaware Avenue and South Street, the stockholders and board of directors of the Railway Company have, by resolution duly adopted and recorded in the books of the Company and recorded in the office of the Secretary of State at Harrisburg, Pennsylvania, determined that the Company shall execute its first mortgage, four per cent., gold bonds of the par value of one thousand dollars each, aggregating ten million dollars, payable at the expiration of fifty years from the first day of May, 1905, subject to prior redemption at one hundred and two and one-half per cent and interest, as in this instrument more fully set out, and that said bonds shall be issued, secured and disposed of as in these presents provided, and have also authorized and directed the execution of these presents; and

Whereas Rapid Transit owns and controls the entire capital stock of Railway Company and has therefore agreed to guarantee the principal and interest of said issue of bonds; and

Whereas the bonds and coupons annexed thereto and the certificate of the Trustee indorsed thereon are to be substantially in the following form, to wit:—

UNITED STATES OF AMERICA.

\$1000.

State of Pennsylvania.

No.

HIGH STREET ELEVATED PASSENGER
RAILWAY COMPANY.

First Mortgage Four per cent Gold Bond.

Principal and interest guaranteed by

DUBOIS RAPID TRANSIT COMPANY.

Total Issue, \$10,000,000.

The High Street Elevated Passenger Railway Company, a corporation of the State of Pennsylvania, for value received, acknowledges itself to be indebted to bearer, or if this bond be registered to the registered holder hereof, in the sum of one thousand dollars, which sum it promises to pay to bearer, or if registered to the registered holder hereof, without relief from valuation or appraisal laws, in gold coin of the United States of America of the present standard of weight and fineness or its equivalent, on the first day of May, 1955, at the office of The Iron City Trust Company, in the city of Dubois, State of Pennsylvania, with interest thereon at the rate of four per centum per annum, payable in like gold coin at the office aforesaid, semiannually, on the first days of May and November in each year, on presentation and surrender of the proper interest coupons hereto annexed as they severally mature, each of which is for six months' interest on this bond.

In case of default either in the payment of this bond or of the interest accruing hereon, or otherwise, such consequences shall ensue as are provided for in the mortgage or deed of trust securing the payment of the same hereinafter mentioned.

Both principal and interest of this bond are payable without deduction for any tax or taxes which the said Railway Company may be required to pay or to retain therefrom under any present or future law of the United States of America, or of the State of Pennsylvania, or of any county or municipality therein.

This bond is one of a series of bonds of like date, tenor, effect and denomination amounting in the aggregate to ten million dollars, numbered consecutively from number one to number ten thousand, both inclusive, the payment of which, with interest coupons attached thereto, according to their tenor and effect, is equally secured without preference, priority or distinction as to lien or otherwise, of one bond over another, by a mortgage or deed of trust bearing date the first day of May, 1905, executed and delivered by the said High Street Elevated Passenger Railway Company to The Iron City Trust Company above named, as Trustee, conveying to it in trust all the main line of railway of the said High Street Elevated Passenger Railway Company, as more particularly described and set forth in said mortgage, with the equipment, franchises, contracts, and privileges appertaining thereto.

Said mortgage also covers the leasehold interest of the Dubois Rapid Transit Company in the property and franchises of the Main Line of said Elevated Passenger Railway Company and the power plant to be erected by the said Rapid Transit Company, Lessee of the said Railway Company, upon premises running from Beach Street to Delaware Avenue between Fairmount Avenue and Laurel Street in the Sixteenth Ward of the City of Dubois as more particularly described in the said mortgage.

The said Railway Company reserves the right, as provided in

the mortgage or deed of trust herein mentioned to call in, pay and redeem this bond at one hundred and two and one-half per cent and accrued interest at any interest period, provided that thirty days' notice, by advertisement in a newspaper of general circulation in the City of Dubois, shall have been first given of such proposed action, as in said mortgage provided.

This bond unless registered shall pass by delivery. This bond may be registered as to principal only in books to be kept for that purpose, at the office of the Trustee in the City of Dubois, and if so registered will thereafter be transferable only upon said books at the office of the said Trustee, by the owner in person, or by attorney, unless the last preceding transfer shall have been to bearer, and shall continue to be susceptible to successive registrations and transfers to bearer, at the option of the holder, but such registration shall not affect the negotiability of the annexed coupons.

This bond is valid only when it shall have been authenticated by a certificate hereon duly signed by the Trustee under the mortgage or deed of trust aforesaid.

In Witness Whereof the said High Street Elevated Passenger Railway Company has caused this bond to be signed by its vice president and its corporate seal to be hereto affixed, attested by its secretary, and the *facsimile* signature of its treasurer to be impressed upon the coupons hereto annexed this first day of May, 1905.

HIGH STREET ELEVATED PASSENGER
RAILWAY COMPANY,
By

[SEAL]

Vice President.

Attest:

Secretary.

For a valuable consideration, the prompt payment of the principal and interest of this bond is guaranteed by the Dubois Rapid Transit Company, in accordance with the terms of the mortgage under which this bond is issued.

Witness the corporate seal of the said company, duly attested, the day and year last above written.

DUBOIS RAPID TRANSIT COMPANY,
By

[SEAL]

President.

Attest:

Secretary.

No.

(Coupon.)

\$20.00.

The High Street Elevated Passenger Railway Company will pay to bearer on the first day of _____, 19____, at the office of the Iron City Trust Company in the City of Dubois, twenty dollars in gold coin of the United States of America of the 1905 standard of weight and fineness, or its equivalent, being six months' interest due on its first mortgage four per cent Gold Bond No.

Treasurer.

(Trustee's Certificate.)

The Iron City Trust Company hereby certifies, that this bond is one of the series described in the within-mentioned mortgage or deed of trust, amounting in the aggregate to ten million dollars.

THE IRON CITY TRUST COMPANY, TRUSTEE,
By

Trust Officer.

[Form for registration endorsed.]

And Whereas all things necessary to make said bonds, when certified by said Trustee as in these presents provided, valid, binding, legal, and negotiable obligations of said Railway Company and said Rapid Transit Company, and these presents a valid mortgage to secure the payment of said bonds, have been done and performed, and the creation and issue of said bonds and mortgage and the making of said guarantee have been in all respects duly authorized:

Now therefore this Indenture Witnesseth That said High Street Elevated Passenger Railway Company, party of the first part, in consideration of the premises and of one dollar to it in hand paid by the said The Iron City Trust Company, party hereto of the third part, receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of said bonds, when issued, and every part of said principal and interest, as the same shall become due, according to the tenor of said bonds and of the coupons thereto annexed, and the faithful performance of the covenants hereinafter contained, and in pursuance of the authority of every kind and nature which said Railway Company has or may have, has granted, bargained and sold, conveyed, released, confirmed warranted, assigned, transferred and set over, and by these presents does grant, bargain and sell, convey, release, confirm, warrant, assign, transfer and set over unto the said Trustee, party of the

Third part, and its successors or successor in the trust hereby created, and to its and their assigns, All of the main line of surface, elevated and underground passenger railway of it, the said High Street Elevated Passenger Railway Company, situate in the Counties of Finley and Boulder, State of Pennsylvania, namely,

Beginning at the Western terminus of said railway, which has been established on property purchased by the said Railway Company, formerly belonging to Sarah L. Pennock and situated on the north side of the West Chester Turnpike Road in Finley County at the point where the Haddington Road intersects with said turnpike road; thence extending eastwardly along a private right of way (acquired from John and William Sellers) to the north of said turnpike road and gradually becoming an elevated structure and curving on to said turnpike road on said elevated structure at or near the boundary line between lands of William Sellers and the Millbourne Mills Company; thence easterly on an elevated structure along said turnpike road to the county line between Finley and Boulder Counties at the western end of Market Street, Dubois; thence continuing easterly upon said Market Street on an elevated structure to the Schuylkill River and crossing the same upon a bridge built and owned by said Railway Company along the line of Market Street as the same has been widened to the north and thence descending and curving into a subway under Market Street, entering the same at a point west of Twenty-third Street and continuing therein to a point at or near Front Street; thence extending in a northerly direction on a private right of way adjacent to said Front Street and reaching an elevated structure at or near Arch and Water Streets; thence extending on said elevated structure east along Arch Street to Delaware Avenue and south along Delaware Avenue to the eastern terminus of said railway as the same may be established at or near South Street: the whole being double tracked, and together with the car barns, shops, and buildings to be erected upon its said western terminal tract in Finley County, and all sidings, switches, turnouts, stations, equipment, cars, engines, rolling stock, rails, bridges, elevated structure, subway, tunnels, improvements and hereditaments now owned by Railway Company and used for the purpose of operating the said main line of railway or which may be hereafter acquired by Railway Company for such purpose and together with all the rights, franchises, grants, licenses and privileges of Railway Company appertaining to the construction, maintenance and operation of the said main line of railway, *to have and to hold* the same, with the appurtenances unto the said Trustee, and its successors and successor in the trust, and its and their heirs, executors, administrators, successors and assigns, forever, to and for their only proper use and behoof; subject to the possession thereof by the Railway Company until default. *In trust nevertheless* for the equal *pro rata* benefit and secu-

ity of each and every the persons and corporations who may be or become the holders of said bonds, without preference, priority, or distinction as to lien or otherwise of any over or from the other by reason of priority in time of issuing or negotiating the same; so that each and all of said bonds issued and to be issued shall have the same right, lien and privilege under this indenture of mortgage, and shall all be equally secured thereby, with the same effect as if they had all been made, issued and negotiated simultaneously on the date hereof.

Provided, however, that if the Railway Company or Rapid Transit their successors and assigns, shall well and truly pay or cause to be paid unto the person or persons, bodies politic or corporate, who shall become the holders of bonds intended to be secured hereby the several and respective sums due thereon, at the times and places herein mentioned for the payment thereof, together with interest on the same, according to the provisions hereof, without any fraud or further delay, then and from thenceforth as well this present indenture and the estates hereby granted and conveyed or intended so to be, as the above-recited obligations, shall become void and of no effect, anything herein contained to the contrary notwithstanding; and satisfaction shall be forthwith entered by the said Trustee or Trustees for the time being upon the record of this indenture of mortgage upon payment to it by the Railway Company, of its proper costs and charges.

It is further covenanted and agreed that the trusts, conditions, and limitations upon which the property and franchises aforesaid are hereby conveyed to the said Trustee and subject to which the bonds secured hereby are issued to and accepted by each and every holder thereof are as follows:—

I.

The issue of bonds secured by this mortgage is ten thousand bonds of the par value of (\$1,000) one thousand dollars each, aggregating (\$10,000,000) ten million dollars, dated the first day of May, 1905, and payable the first day of May, 1955. The Trustee shall certify and deliver all of the bonds upon the order in writing of the President and Secretary of the Railway Company. Railway Company shall forthwith deliver the same to Brown & Company, Bankers, who have agreed to purchase and pay cash for the entire issue, paying over to the Railway Company and Rapid Transit, as the case may be, at the time of such purchase, a sum equal to the amounts which they shall have respectively expended at that time upon the acquisition and construction of the mortgaged premises, including the power house hereinafter referred to, as shown by certificates of

the Chief Engineers of said respective Companies, verified by the affidavit of the Treasurers thereof; the balance of the amount due on the purchase of the said entire issue shall be held by Brown & Company on deposit to the credit of Railway Company and Rapid Transit to be paid to them respectively in installments on the first days of each November and May thereafter upon the filing of similar certificates and affidavits setting forth the additional amounts expended during each preceding six months upon the construction and equipment of the mortgaged premises, including said power house and connections. The affidavits of the Treasurer required hereunder shall further state that there are no outstanding liens or undisputed claims which are unprovided for against said property.

The Trustee shall not in any wise be responsible for the application of the proceeds of any bonds which may be certified and delivered by it in accordance herewith, nor for the securing of the lien of this mortgage upon the plant, construction, equipment, additions, betterments, and improvements above provided for.

II.

The Railway Company shall have the right, which is hereby expressly reserved to it, to call in, pay, and redeem any or all of the bonds issued hereunder and secured hereby, at any interest period by paying therefor the principal sum due thereon with two and one-half per centum thereof additional and any accrued interest. The said bonds are to be called, and notice of call thereof given in the following manner, to wit: Whenever and as often as the Railway Company desires to pay and redeem any of the said bonds, it shall make known to the Trustee its intention so to do by delivering to it a certified copy of a resolution of its board of directors, which resolution shall specify the amount of bonds so to be redeemed, and the time for the redemption and payment of the same; thereupon the Trustee shall draw by lot out of the whole number of bonds then unpaid such a number of said bonds as said resolution may require, and at least thirty-five days before the day named for the payment and redemption of said bonds so called, the Railway Company shall deposit with the Trustee such an amount of money as will suffice to redeem the bonds so called at par with two and one-half per centum thereof additional, and interest thereon to the date of redemption, together with the cost of advertising and other expenses incident thereto; and the bonds so drawn shall be paid by the Trustee at par with two and one-half per centum thereof additional and any accrued interest due thereon at a day to be specified in a notice thereof to be given by the Trustee by publication of the same four times during the period of thirty days in one newspaper of general circulation published in the City of Dubois,

which notice shall specify, if less than the whole number of bonds then outstanding are called, the serial numbers of the bonds drawn by the said Trustee for such redemption.

On and from the day named in the said notice for such payment and redemption, the interest upon the bonds so drawn and advertised, and for which the money shall be in the hands of the Trustee, shall cease and determine, and the coupons representing any future interest shall from that day thenceforth and forever thereafter be void and of no force or effect, and the Railway Company shall not be liable for any of the said future interest, and on and from the day named in the said notice for such payment and redemption, the lien hereby secured upon the property, rights, privileges, and franchises herein conveyed, in so far as it relates to and secures all and any such bonds so drawn and advertised, together with the interest coupons not then due on the same, shall cease and determine and be thenceforth null and void. All bonds so paid and redeemed, together with the coupons thereto belonging, shall thereupon be canceled by the Trustee and surrendered to the Railway Company or be physically destroyed.

III.

Upon the written request of the Railway Company, approved by a resolution of its board of directors, from time to time, while the Railway Company is in possession of the mortgaged premises or property pledged hereby, the Trustee may release from the lien and operation of this mortgage or deed of trust any part of the mortgaged premises, equipment, cars, engines, rolling stock, power house, electrical machinery, or other property pledged hereby which, in the opinion of the Railway Company at the time of such release, shall no longer be required for the purposes for which it may have been acquired and used, or shall no longer be necessary or expedient to be retained in connection with the business of the Railway Company, or which may have become unfit or undesirable for use, or for which more desirable property of similar character has been substituted: *Provided, however*, the Railway Company shall apply the proceeds of such sale and any moneys received therefrom either to the purchase of the bonds secured by this mortgage (in which event the said bonds so purchased shall be canceled and delivered to the said Trustee), or to the purchase of other property, real or personal, or to betterments on the mortgaged premises and property pledged hereby. And new property acquired by the Railway Company to take the place of any property so released, as well as any property received in exchange, shall at once be and become subject to the lien of this mortgage as fully as if specifically mortgaged and pledged hereby. If the Railway Company shall be re-

quested by the Trustee, it will immediately by appropriate instruments of writing convey, assign, and transfer to it such new property for the purposes of this indenture.

The purchaser or purchasers of any property so released or of any equipment or machinery so sold or disposed of under this section shall not be required to see to the application of the purchase money.

A certificate, signed by the president or secretary of the Railway Company, may be received by the Trustee as conclusive evidence of any of the matters provided for in this section, and shall be full authority to the Trustee for its action on the faith thereof, but the Trustee, in its discretion, may require such further and additional evidence as to it may seem reasonable.

IV.

The Railway Company, its successors and assigns, shall and will, on demand in writing from the Trustee, at any time make, execute, acknowledge and deliver, or procure to be made, executed, acknowledged and delivered, all such further acts, deeds and assurances in the law as may in the opinion of counsel for the Trustee be reasonably required of it for effectuating the intention of these presents, and the better assuring and confirming unto the Trustee, its successors and assigns upon the trusts and for the purposes herein expressed, all and singular the property, appurtenances, rights and franchises hereby mortgaged, whether now owned or possessed or hereafter acquired by said Railway Company, its successors or assigns.

V.

The Railway Company shall pay the principal of all the bonds issued under this mortgage when the principal shall become due by the terms of the bonds or by declaration as herein provided, upon the surrender of the bonds, and it shall pay the interest thereon according to the terms of the bonds, upon the presentation and surrender of the proper coupons for such interest, until the principal of the bond is paid, without deduction from the principal or interest of any tax herein mentioned which the Railway Company may be required to pay or retain therefrom. No bonds shall be valid as secured under this mortgage or deed of trust except such as shall be authenticated by the certificate of the Trustee endorsed thereon, signed by an officer of the said Trustee.

When and as the coupons attached to the said bonds mature and become payable, they shall be paid on demand by the Railway Company and be canceled. No purchase or sale of the said coupons or of any of them, and no advance or loan thereon, nor redemption

thereof, by or on behalf of the Railway Company, after the same shall have been detached from the bonds to which they belong, shall keep such coupons alive—or preserve their lien upon the mortgaged property or franchises; but nothing herein contained shall be intended or construed to prevent the Railway Company by arrangement with the holder or holders of the bonds then outstanding, from extending the time of payment of, or changing the rate of interest on, all of the said bonds; and such extended or changed bonds and the coupons thereon shall, subject to such alteration, retain all the benefits and protection of this mortgage to the same extent as if such extension or change had not been made.

Said Railway Company hereby promises and agrees that it will pay or cause to be paid all taxes which the said Railway Company may lawfully be required to pay or to retain on account of the principal or interest of the bonds secured by this mortgage by any law of the United States of America, or the State of Pennsylvania, or any county or municipality therein, and all taxes, rates, levies, charges, assessments, or other liens, which are or may lawfully be imposed, created, levied or assessed on said Railway Company or on any of the property, real and personal, rights, privileges and franchises hereby conveyed, by any law of the United States of America or of the said State, or ordinance or resolution of any city or county therein, whereby the security of this mortgage may be impaired; and it will not suffer hereafter any lien superior to the lien hereby created to attach to said property, rights, privileges or franchises, or any part thereof.

VI.

In case the Railway Company shall make default in the payment of any installment of interest upon the bonds secured hereby, or any of them, or in the performance of any of the covenants herein contained on its part to be performed (other than to pay the principal of the bonds hereby secured at maturity thereof), and in case such default shall continue for three months, and be followed by thirty days' default on the part of the Dubois Rapid Transit Company, as in paragraph XI. provided, then and in any such case, if the holders of twenty-five per centum in value of the outstanding bonds hereby secured shall so elect in writing and shall produce and deposit their bonds with the Trustee and notify the Trustee in writing of such election, the whole principal of all the bonds hereby secured shall thereupon be declared by the Trustee to be and shall immediately become due and payable, and it shall be the duty of the Trustee, upon request in writing, signed by the holders of twenty-five per centum in value of said bonds then outstanding, and upon being indemnified to its satisfaction, to institute proper proceedings at law or in equity to enforce the lien hereby created.

The principal of the bonds secured hereby having become due at maturity, or as in this article provided, and remaining unpaid for the space of thirty days after demand for the payment thereof shall have been made upon the Dubois Rapid Transit Company, as provided in paragraph XI. hereof, it shall be lawful for the Trustee to proceed to sell at public auction unto the highest bidder, all and singular the property and franchises hereby mortgaged that shall then be subject to the lien, operation, and effect of this indenture, with the appurtenances, and all benefit and equity of redemption of the Railway Company, its successors or assigns therein. Such sale shall be made by the Trustee, or by its attorney, or attorneys, agent or agents, in the city of Dubois, State of Pennsylvania, after notice of the time and place of sale and of the property to be sold shall have been given by the Trustee, by publication thereof in at least one daily newspaper published in the county of Boulder once a week for not less than six consecutive weeks (together with such other notice, if any, as may be required by law), and the Trustee may, without further advertising such sale, adjourn the same from time to time for such period or periods as it may deem advisable, and after such sale shall execute, acknowledge, and deliver to the purchaser or purchasers a good and sufficient deed or deeds of conveyance of said property, which shall be a bar against the Railway Company, its successors and assigns, and all persons claiming by, through, or under it or them, with respect to any of the property so sold. The Railway Company shall and will, if and when thereunto requested thereafter make, execute, and deliver such deeds and other instruments as shall be reasonably required to confirm and assure such title and ownership in and to such purchaser or purchasers. The receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of all the property so sold, or any part thereof, for his or their purchase money; and the purchaser shall not be bound to see to the application of the purchase money.

Upon the making of any such sale under this section the Trustee shall apply the proceeds thereof as follows:—

First.—To the payment of the costs and expenses of such sale or sales, including a reasonable compensation to the Trustee, its agents, attorneys, and counsel, and all expenses, liability, and advances made and incurred by the Trustee hereunder and all payments made by it of sums of money required to be paid for taxes, assessments, insurance premiums, and other charges on the hereby-mortgaged property.

Second.—To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon said bonds, or any of them, whether the said principal by the tenor of said bonds be then due or yet to become due, and in case of the insufficiency of such proceeds to pay in full the whole amount of principal and

interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, without preference of one bond over any of the others, or of interest over principal or of principal over interest.

Third.—To pay over the surplus, if any, on demand, to whomsoever may be lawfully entitled to receive the same.

VII.

The foregoing power of sale is cumulative to all other remedies, suits, actions, and proceedings, at law or in equity, for the protection and security of the several owners of the bonds entitled to the security of and under this mortgage, and the Trustee, in case of any default, as hereinbefore and hereinafter mentioned, may, upon the request in writing of the holders of twenty-five per centum in amount of such outstanding bonds as hereinbefore and hereinafter provided for, and upon being reasonably indemnified, pursue any other remedy and institute any other suit, action, or proceeding to effect the protection and security so hereby sought to be afforded.

It is expressly understood and agreed that no suit or proceeding for the foreclosure of this mortgage shall be instituted or prosecuted by the holder of any bond or bonds of the issue secured hereby, until after the Trustee shall have been requested in writing as above provided for to take such action and an offer of reasonable indemnity shall have been made to the Trustee, and it shall have refused or failed to comply with such request for sixty days after the same shall have been made, nor shall any action of the Trustee, or of the bondholders hereunder, or both, in waiving any default extend to or be taken to affect any subsequent default or to impair any rights arising thereunder, as herein provided.

VIII.

In case of a sale of the mortgaged premises or any part thereof, either by the Trustee or in the course of judicial proceedings as herein provided, the purchaser or purchasers at such sale, in making payment of the purchase money and making settlement thereof, after making a cash payment sufficient to cover the costs and expenses of the sale and all other charges which must be provided for in actual cash, shall have the right to deliver and pay to the said Trustee, and turn in and use toward the payment of the purchase money any of the bonds and coupons for interest due thereon held by him or them, to or toward the payment of which the net proceeds of such sale shall be legally applicable; the amount of such bonds or coupons for interest due thereon so to be paid in to be

determined and fixed by the said Trustee, and at a sum which shall, upon a proper distribution and accounting for such proceeds, not exceed the share or proportion payable out of such net proceeds to such purchaser or purchasers as the holder or holders of such bonds.

And it is hereby declared and made a condition of this trust that all persons who shall claim any interest, benefit, or advantage by virtue of this instrument shall take the same subject to all the terms herein contained, and subject to all the rights and powers conferred by this instrument on the Trustee and on the holders of twenty-five per cent (25%) of the bonds hereby secured.

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IX.

Upon the filing of a bill in equity or commencement of other judicial proceedings to enforce the rights of the Trustee and the bondholders under these presents, the Trustee shall be entitled to the appointment of a Receiver or Receivers of the property hereby mortgaged, and of the earnings, income, rents, issues, and profits thereof pending such proceedings, with such powers as the court, making such appointment, shall confer.

The Railway Company shall not, while any bonds secured by this mortgage are outstanding, apply for the appointment of a Receiver of any property or franchises covered hereby.

X.

The Railway Company irrevocably waives all benefit of any present or future valuation, stay, extension or redemption laws, and hereby irrevocably waives all right to have the mortgaged property and franchises marshaled upon any sale thereof, and consents that the same may be sold as one property.

XI.

The Dubois Rapid Transit Company hereby guarantees and agrees as surety to make the several payments on account of interest on the bonds issued hereunder and the ultimate payment of the principal in case there be at any time any default on the part of the Railway Company in respect to any or all of said payments. And none of the remedies herein provided for enforcing against Railway Company performance of any of the covenants entered into herein by it shall be invoked until default on the part of the Railway Company shall be followed by written demand from the Trustee

to the Dubois Rapid Transit Company to make good the same and default for thirty days thereafter on the part of the Dubois Rapid Transit Company; whereupon the Trustee may proceed to sue for and collect from the Dubois Rapid Transit Company any sum due for interest or principal of said bonds without first pursuing or exhausting the remedies against the Railway Company or at its option the Trustee may pursue both companies simultaneously until its claim hereunder shall be satisfied and discharged.

XII.

All of the property and franchises of Railway Company are leased to the Dubois Rapid Transit Company, which is a guarantor and surety of the principal and interest of this issue of bonds. Said Rapid Transit Company, as Lessee, will, prior to default hereunder, operate the said railroad, and by virtue of its powers and of its contract of lease, will furnish the electric current necessary for such operation. In order to further secure said issue of bonds and make this Mortgage an absolutely first lien upon the property mortgaged, the Dubois Rapid Transit Company, for the consideration aforesaid, has granted, bargained, sold, conveyed, aliened, released and confirmed, and by these presents does grant, bargain, sell, convey, alien, release and confirm unto the said Trustee, party of the third part, and its successors or successor in the Trust hereby created, and to its and their assigns, all its interest as lessee in and to all that part of the property and franchises of the High Street Elevated Passenger Railway Company which is covered by this mortgage to wit, the Main Line and its appurtenances, and also all that certain tract of land situate in the Sixteenth Ward of the city of Dubois, beginning at a point on the East side of Beach Street One hundred and sixty (160) feet South of Laurel Street; and thence extending in a Southerly direction along the said East side of Beach Street One hundred and sixty-two feet six inches (162' 6'') to a point; and thence in an Easterly direction along a line at right angles to said Beach Street two hundred (200) feet to the West side of Delaware Avenue; thence in a Northerly direction along the West side of said Delaware Avenue One hundred and forty-two feet six inches (142' 6'') to a point; thence in a Westerly direction along a line at right angles to said Delaware Avenue One hundred (100) feet to a point; and thence in a Northerly direction along a line at right angles to said last mentioned line and parallel with Delaware Avenue twenty (20) feet to a point; and thence in a Westerly direction along a line at right angles to said last mentioned line One hundred (100) feet to a point in the East side of Beach Street, the place of beginning; also the buildings, boilers, engines, dynamos, and machinery to be thereon erected as and for a power house for

the manufacture of electricity for the purpose of operating the line of railway hereby mortgaged, together with all cables, conduits, and electrical connections necessary for supplying and distributing the electrical current so manufactured to Railway. **To have and to hold** the same, with the appurtenances, unto the said Trustee, and its successors and successor in the Trust and its and their heirs, executors, administrators, successors and assigns, forever, to and for their only proper use and behoof, subject to the possession thereof by the Rapid Transit Company until default, **in trust however**, for the equal *pro rata* protection of the holders of bonds hereunder. And it is further covenanted and agreed that all of the trusts, terms, provisions and conditions of this mortgage and all of the remedies given to the Trustee with respect to enforcing the lien of this mortgage against the property of said Railway Company shall apply with equal force to the said leasehold interest and to said tract of land, the power house thereon erected and the electrical connections included in this paragraph, as if they and the said Dubois Rapid Transit Company were by apt words expressly named and included in each of the said covenants and conditions. But nothing in this paragraph or in this mortgage contained shall be construed to prevent the Railway Company from hereafter executing a mortgage which shall be a first lien upon any additional line or route which the Railway Company may hereafter construct by virtue of any franchise now possessed or hereafter acquired.

XIII.

The Trustee may, and upon the request of the Railway Company shall, cancel and discharge the lien of these presents and execute and deliver to the Railway Company such deeds or discharges as shall be requisite to discharge the lien hereof and to reconvey to or revest in the Railway Company the estate and title hereby conveyed or intended to be, whenever all the bonds and coupons secured hereby, which shall have been duly issued, shall be paid and canceled, whether before or after maturity, and upon payment of all other sums secured hereby; which cancellation or destruction of bonds shall take place in the presence of representatives duly appointed on behalf of the Railway Company, of the Rapid Transit Company, and of the Trustee and upon receiving their certificate of the fact it shall be the duty of the Trustee to discharge said lien of record and reconvey to the Railway Company at the cost and charge of the Railway Company the estate and title hereby conveyed or intended so to be. And if at any time the Railway Company shall become the holder and owner of all of said bonds and unpaid coupons and shall present the same to the Trustee and request the discharge of the lien of these presents, whether

before or after maturity, the Trustee, upon payment of all other sums secured hereby, shall cancel or destroy such bonds and coupons in the manner provided above in this article, and shall discharge said lien of record and reconvey to the Railway Company at the cost and charge of the Railway Company, the estate and title hereby conveyed or intended so to be.

XIV.

In the event of the dissolution, resignation, removal, refusal or incapacity to act of the Trustee herein named or its successors or successor in the trust, or in the event of a vacancy in the trusteeship from any cause whatsoever, any court of competent jurisdiction in the city of Dubois may appoint a successor or successors in this trust to fill such vacancy on the written application of the holders of bonds hereby secured to the aggregate amount of one tenth of the bonds then outstanding, and the acceptance of the trust by such new trustee or trustees appointed in accordance herewith to fill such vacancy, to be endorsed on the record of the instrument appointing such new trustee. Such new trustee or trustees, when so nominated and appointed to act, shall take upon himself, itself, or themselves the same trusts, and have and exercise the same powers, and be subject to the same stipulations and conditions as are created, imposed, granted, and mentioned in and by this indenture; and said powers, stipulations, and conditions shall extend to and be performed and executed by such newly appointed trustee or trustees in the same manner and with the same force and effect as if originally named herein; and like nomination and appointment shall and may be made and carried into effect from time to time when and as often as there may be occasion therefor, upon the same contingencies in like manner and with the same effect as hereinbefore mentioned; and further, the Trustee for the time being may be removed at any time by instrument in writing under the hands and seals of the holders of a majority of the then outstanding bonds hereby secured, acknowledged, and recorded as aforesaid.

XV.

For the debt and bonds secured hereby the Railway Company is liable *in personam*, and any deficiency, after exhausting the mortgage security, may be enforced against the Railway Company and the Dubois Rapid Transit Company as surety and guarantor, but not against the officers, directors or stockholders thereof individually, and it is expressly agreed between the parties hereto, and by every person who shall take or hold any bond or bonds issued here-

under, that no persons who are now or may hereafter become officers, directors, or stockholders of the Railway Company or Rapid Transit shall in anywise be held liable for the payment of either the principal or interest of the bonds secured hereby.

XVI.

If any bond hereunder shall be mutilated, lost, or destroyed, the Railway Company may, upon terms and conditions prescribed by its board of directors, issue and deliver in lieu thereof a new bond of like tenor, amount and date, which bond, when so issued, shall be certified by the Trustee, upon affidavit of such mutilation, loss, or destruction, and satisfactory corporate security and indemnity to Railway Company and the Trustee by the owner of such bond.

XVII.

The Railway Company shall keep at the Trustee's office in the city of Dubois bond transfer books, on which the transfer of any of said bonds shall, upon request, be registered as to principal only, without expense to the holder. Each registration of a bond shall be noted on the bond, after which no transfer thereof can be made except on said books, until again registered as payable to bearer, when the bond will become transferable by delivery until again registered in like manner in the name of the holder. For the purpose of administering the trusts created by this mortgage the person in whose name any bond is registered on said books shall be taken to be the holder and owner thereof.

XVIII.

The Railway Company and Rapid Transit hereby covenant, promise and agree that out of the proceeds of the said bonds to be reserved, as hereinbefore provided, they will complete and equip the entire main line of railroad, as above described with its bridge across the Schuylkill River, its elevated and subway structures and said power house, and that if the balance of the proceeds reserved prove insufficient they will furnish out of their own funds a sum sufficient for the completion and equipment of the said railroad, with power house and all other appurtenances required for the construction, equipment and operation of the said road; and in case of default like proceedings may be had as are herein provided for in case of default in payment of interest on said bonds.

XIX.

Rapid Transit maintains a fire insurance fund separate and apart from its general assets to protect the property of its own and its leased lines. The protection of said fund will extend to the property hereby mortgaged. So long as such a fund is maintained at upwards of One Million Dollars (\$1,000,000) it shall be accepted as satisfactory indemnity against fire in respect to the mortgaged premises. Rapid Transit shall in the month of December of each year file with the Trustee a statement of its insurance fund verified by the affidavit of its Treasurer. In case said fund should at any time be impaired so as to fall below the said sum of One Million Dollars (\$1,000,000) then Railway Company and Rapid Transit covenant and agree to cause the power house, car barns and shops covered by this mortgage to be insured in Insurance Companies licensed to do business in Pennsylvania for eighty (80) per cent of their respective values and to maintain such policies in force until the impairment of said fund shall be made up. All policies so taken out shall be made payable to the Trustee, Mortgagee as its interest may appear.

In case of a loss by fire, Railway Company and Rapid Transit agree to restore or replace the mortgaged property, so damaged or destroyed out of the said insurance fund or out of their other moneys, and the property thus repaired or replaced shall be subject to the lien of this mortgage. If, at the time of any loss, there should be policies of insurance covering the property damaged or destroyed, then the insurance money shall be paid to the Trustee, and if the Railway Company by its president shall notify the Trustee that it desires to repair or rebuild or replace the property injured and destroyed, and shall certify the amount required for such purpose, the Trustee shall pay to the Treasurer of the Railway Company so much of the insurance money, or the whole thereof, as may be so required. And the Railway Company shall set apart said fund to be applied solely for the repair, rebuilding, and replacement of the property lost or damaged, and all such new property shall become immediately subject to the lien of this mortgage. And as to any portion of said insurance money, or the whole thereof, which may not be required by the Railway Company for the above purpose, the Trustee shall retain the same to the credit of an account to be used upon the direction of the Railway Company for the redemption of bonds as herein provided for.

In case of any loss covered by any policy of insurance any appraisalment or adjustment of such loss and settlement and payment of indemnity therefor which may be agreed upon between the Railway Company and any Insurance Company may be consented to and accepted by the said Trustee, and the Trustee shall be in no way liable or responsible for the insurance or deficient or noninsur-

ance by the Railway Company or for the collection of any insurance in case of loss by fire, or for the maintenance or investment of said insurance fund by Rapid Transit or for the truth of said statements to be filed with respect thereto.

XX.

It is hereby covenanted, agreed, and understood, and the within trust is accepted upon the express condition, that neither the said Trustee nor any future trustee or trustees, shall incur any responsibility or liability whatever in consequence of permitting or suffering said Railway Company, or its successors, or its Lessee the said Rapid Transit Company and its successors to retain or be in possession of the lands, buildings, machinery, personal property, estate, and premises, hereby mortgaged, agreed, or intended so to be or any part thereof, or in consequence of its use, enjoyment, sale, or disposal of the same; nor shall said Trustee, nor any future trustee or trustees, be or become responsible or liable in any manner for the disposition of any of the bonds hereby secured, the certificates upon which it shall have signed, and which it shall or may deliver, as hereinbefore provided; nor shall the said Trustee, nor any future trustee or trustees, be or become responsible or liable for any destruction, deterioration, loss, injury, or damage which may be done or occur to the buildings, machinery, and property hereby mortgaged or agreed, or intended so to be, either by said Railway Company or its agents or servants, nor shall the said Trustee, nor any future trustee or trustees be held liable for any act or misconduct of any agent or person employed by it unless chargeable with culpable negligence in selecting or continuing the employment of the same; nor shall the said Trustee, nor any future trustee or trustees, be answerable except for its, his, or their own willful default or misconduct; but in all cases the Trustee shall be authorized to pay such reasonable compensation as it may deem proper to all attorneys, servants, and agents who may be reasonably employed in and for the management of the trust; and said Trustee shall not be liable for any neglect, omission or wrongdoing of any such agent or attorney after reasonable care shall have been exercised in his selection. The said Trustee and its successor or successors may resign from the trust by notice in writing to said Railway Company at least sixty days before such resignation shall take effect, or such other time as may be accepted as sufficient notice, and upon the execution and delivery, if such shall be required, of a deed of conveyance and transfer to its or their successors or successor in the trust.

The Trustee shall not be bound to attend to the recording of this mortgage, nor take any action for effecting or perpetuating or

keeping good the lien of these presents upon any portion of the hereby mortgaged property, but the Railway Company, its successors and assigns, shall, from time to time, do all things needful in that behalf. The Trustee shall be entitled to a reasonable compensation for its services, and to reimbursement of all expenses properly incurred hereunder, including the expenses of the proper prosecution or defense of any suit or proceeding instituted by or against it, such compensation and expense to be a first charge upon any fund that may come into the hands of the Trustee, or, if there be no such fund, then the same shall be paid by the Railway Company, or by the party at whose instance such service may be performed or expense incurred.

The recitals in this instrument contained are made on the part of the Railway Company, and the Rapid Transit Company, and the Trustee assumes no responsibility therefor.

XXI.

The High Street Elevated Passenger Railway Company doth hereby constitute and appoint Charles Wilson to be its attorney for it, and in its name and as and for its corporate act and deed to acknowledge this mortgage or deed of trust before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

And the Dubois Rapid Transit Company doth hereby constitute and appoint R. B. Ransome to be its attorney for it, and in its name and as and for its corporate act and deed to acknowledge this mortgage or deed of trust for the purpose and to the extent herein mentioned before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

And The Iron City Trust Company doth hereby constitute and appoint Albert Collins to be its attorney for it, and in its name and as and for its corporate act and deed to acknowledge this mortgage or deed of trust before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

In Witness Whereof the High Street Elevated Passenger Railway Company and the Dubois Rapid Transit Company have caused these presents to be executed by their respective presidents, and their respective corporate seals to be hereunto affixed, duly attested by their respective secretaries, and The Iron City Trust Company, to signify its acceptance of the trusts hereby created, has caused these presents to be executed by its president and its corporate seal to

be hereunto affixed, duly attested by its secretary, the day and year first above written.

HIGH STREET ELEVATED PASSENGER
RAILWAY COMPANY,
By

(Signed) FREDERICK WARD,
President.

[CORPORATE SEAL]

Attest:

(Signed) CHARLES WILSON,
Secretary.

DUBOIS RAPID TRANSIT COMPANY,
By

(Signed) JAMES LISTER,
President.

[CORPORATE SEAL]

Attest:

(Signed) R. B. RANSOME,
Secretary.

THE IRON CITY TRUST COMPANY,
By

(Signed) J. HOWARD QUINN,
President.

[CORPORATE SEAL]

Attest:

(Signed) ALBERT COLLINS,
Secretary.

State of Pennsylvania, }
Boulder County. } ss.

I hereby certify that on this first day of May, in the year of our Lord one thousand nine hundred and five (1905), before me, the the subscriber, a notary public in and for the Commonwealth of Pennsylvania, residing in the County of Boulder, personally appeared Charles Wilson, the attorney named in the foregoing mortgage or deed of trust by the High Street Elevated Passenger Railway Company, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage or deed of trust to be the act of the said High Street Elevated Passenger Railway Company, to the end that it might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

[NOTARY'S SIGNATURE, SEAL, ETC.]

State of Pennsylvania, }
Boulder County. } ss.

I hereby certify that on this first day of May, in the year of our Lord one thousand nine hundred and five (1905), before me, the subscriber, a notary public in and for the Commonwealth of Pennsylvania, residing in the County of Boulder, personally appeared R. B. Ransome, the attorney named in the foregoing mortgage or deed of trust by the Dubois Rapid Transit Company, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage or deed of trust to be the act of the said Dubois Rapid Transit Company for the purposes and to the extent therein stated, to the end that it might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

[NOTARY'S SIGNATURE, SEAL, ETC.]

State of Pennsylvania, }
Boulder County. } ss.

I hereby certify that on this first day of May, in the year of our Lord one thousand nine hundred and five (1905), before me, the subscriber, a notary public in and for the Commonwealth of Pennsylvania, residing in the County of Boulder, personally appeared Albert Collins, the attorney named in the foregoing mortgage or deed of trust by The Iron City Trust Company, and by virtue and in pursuance of the authority therein conferred upon him, acknowl-

edged the said mortgage or deed of trust to be the act of the said The Iron City Trust Company, to the end that it might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

[NOTARY'S SIGNATURE, SEAL, ETC.]

QUESTIONS

1. What is an unsecured creditor? What is a judgment creditor?

2. The insolvent Webb Manufacturing Company transferred all its property to Josephs, its treasurer, to pay him for money loaned to the company. Wolf and some other outside creditors sued to have the transfer set aside and the property used to pay all the creditors an equal share. Will an order to this effect be made?

3. In 1904 the Montgomery Paper Company fraudulently transferred to Donovan, one of its directors, a large part of its property, so that the company had next to nothing with which to pay its debts. Siebert sold the company some machinery in 1905 and when he found that the company was insolvent and that it was impossible for him to collect his debt, he sued to have the property which the company had fraudulently transferred to Donovan applied to the payment of his debt. Which side wins?

4. May creditors of an insolvent company sue stockholders for the unpaid balance of their subscriptions?

5. Is a release of the right to make calls on unpaid stock binding as against the creditors of an insolvent company?

6. May a stockholder be forced to refund dividends which the directors have paid out of the capital of the company?

7. The Munroe Iron Company, being greatly in need of money, issued 4,000 shares of stock and put them on the market, to be sold for what they would bring. The stock sold for half its par value. After the failure of the company, its receiver sued Harrison, one of the purchasers of this stock, to recover the difference between the price he had actually paid and the par value of his stock. Can the receiver recover?

8. Is stock issued by a corporation in payment for property or services always exempt from the demand of the company's creditors?

9. Who is liable for unpaid stock which has been fraudulently marked full paid?
 10. To what extent are stockholders liable for corporate debts?
 11. What is the liability of stockholders in national banks?
 12. What is a secured creditor? What is a mortgage?
 13. What is a corporate bond?
 14. How are corporate bonds issued? Why is it usually required that each bond shall be certified by the trustee before it shall be valid?
 15. When are bonds negotiable? Does the registration of bonds affect the negotiability of the interest coupons attached to the bonds?
 16. When is a bond redeemable and when is it matured? •
 17. What is the object of a clause providing that the corporation, with the trustee's consent, may still freely dispose of the mortgaged property?
 18. What are the remedies of bondholders when default is made in the payment of either interest or principal?
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PART SIX

DISSOLUTION OF CORPORATIONS

CHAPTER XXI

RECEIVERSHIPS AND ASSIGNMENTS UNDER STATE LAWS

372. Altogether independently of state statutes, any corporation may, under the common law, turn over all its assets to a receiver or trustee for the proper payment of its creditors, unless the law governing the company expressly forbids this action. But such an assignment must be for the benefit of all the company's creditors. Its effect is to pass to the trustee or receiver all the company's property including its franchises, claims for unpaid stock subscriptions, and its rights to sue and to recover debts or damages.

RINGO v. BISCOE et al., TRUSTEES, 13 Ark. 563 (1853). Ringo was a creditor of the Real Estate Bank of Arkansas. In this suit against its trustees, the bank having assigned for the benefit of its creditors, the question of the validity of the assignment was raised. *Held* that a corporation, unless restricted by its charter or by some statute, may, in virtue of its general power to contract, make an assignment, entire or partial, of its effects for the payment of its debts. If made in good faith, such assignment will be as valid as one made by a private individual.

373. Ordinarily, the directors of an insolvent company may, even without the stockholders' sanction, make such an assignment. See Section 143. The creditors, moreover, seldom have any standing to object to this action, for they may well be answered that it is particularly for their benefit. Yet abuses of the power to assign the company's

property are possible, especially if the assignee is a mere tool of the corporation. And to restrict this opportunity for fraudulent collusion, assignments not under statutory safeguard are prohibited under certain circumstances in Michigan, New Jersey, and Ohio.

HUTCHINSON et al. v. GREEN et al., 91 Mo. 367 (1886). The plaintiffs were stockholders of the Keokuk Northern Line Packet Company. The defendants were directors of the same concern. The defendants had in good faith assigned the company's property for the benefit of its creditors. The plaintiffs denied the power of the directors to do this. *Held* that, unless restricted by statute, by-laws, or articles of association, the directors are the proper parties to make an assignment for the benefit of creditors. And herein they may act not only without the consent, but even against the expressed will, of the stockholders.

374. Since an assignment for the benefit of creditors does not work a dissolution of the corporation in the strict meaning of the term, the corporation, that is its life, may exist independently of the exercise of its functions and of its ownership of property. Accordingly, a corporation may be sued after such an assignment, and rights acquired before the date of the assignment are not thereby impaired.

FIETSAM v. HAY, 122 Ill. 293 (1887). The Peoples Bank of Belleville, chartered by a special act of the Illinois Legislature, made an assignment for the benefit of its creditors. The assignee sought from the court leave to sell the "rights, privileges, powers, and immunities granted by the act incorporating the bank." This leave was refused, and it was *held* that although all the other property or privileges of a corporation might be taken away or transferred, yet its right to existence as a corporation must remain in the incorporators to whom the right was given by the state until abandoned or forfeited to the state.

375. State statutes relating to corporations have largely superseded the common law in this matter of assignments for the benefit of creditors, and ordinarily they prescribe

a certain procedure in cases where it is desired to liquidate a corporation. These state statutes usually provide that a receiver may be appointed by the proper court upon the petition of a creditor or of stockholders or of the board of directors; so that a corporation may be put into a receiver's hands either involuntarily or voluntarily. The most important objects of these proceedings are to preserve whatever assets the corporation possesses as a fund for the payment of its debts; to give the creditors opportunity to come in and claim what is due them, and to distribute this fund fairly among the claimants.

376. Under a common-law assignment any one may be assignee, although the courts have in some instances removed an assignee against whom grave suspicions of improper collusion were supported by the circumstances surrounding his appointment. The statutes of Idaho, Montana, and Utah, however, having the ideal of making an assignee an impartial administrative stakeholder, provide that no one with an interest in the liquidation, either as officer or stockholder or creditor of the corporation, shall be its assignee.

FAILEY v. STOCKWELL, 2 D. R. (Pa.) 197 (1893). Stockwell was assignee of the Mutual Banking, Surety, Trust and Safe Deposit Company, an insolvent corporation. It was asserted that he was the solicitor who had advised the assignment and was intimately associated with the alleged fraudulent management of the corporation. This proceeding was brought by Failey to have Stockwell removed from his post of assignee. *Held* that there was just cause for apprehension from the above-mentioned circumstances, and that the defendant should be removed.

377. At any rate, the consideration of highest importance to the public is in most cases, that all creditors shall receive equal justice in the distribution of the company's assets. In fact, some courts have thought this consideration so important as to lay down the rule that the assignee

or receiver of a company's assets is a trustee for the benefit of all the creditors, and that therefore he cannot in equity prefer any creditor or group of creditors to the others. And although this doctrine has been seriously modified and often denied altogether by other courts, especially where the trustee or receiver is still operating the business of the company, or where there is a possibility that its business may be resumed at some future time, it has become crystallized into the statutes of many states. Most states in express terms forbid receivers or assignees for the benefit of creditors to grant or to allow preferences, and also forbid the corporation, before assignment or receivership, to prefer creditors when insolvency is imminent. Yet in some states the courts have held that preferences are legal, even to the extent of allowing precedence to the stockholders of an insolvent corporation over its creditors, or, worse still, to its directors and officers over its stockholders. This unscrupulous doctrine is supported by decisions in Alabama, Colorado, Indiana, Iowa, Michigan, Mississippi, South Carolina, and Virginia.

HILL v. LUMBER Co., 113 N. C. 173 (1893). Hill was a creditor of the defendant company. The company had secured a debt which it owed one of its directors by allowing him to obtain judgment against it when insolvency was imminent. Hill sued to have this judgment declared void, as an unfair preference over other creditors. *Held* that the director under these circumstances occupied a fiduciary position and that he must preserve the company's assets for the equal benefit of its creditors. The judgment was declared void.

378. The obvious objection to allowing stockholders to be preferred over outside creditors is that stockholders are properly proprietors of the corporation and should not use their influence to benefit themselves at the outside creditors' expense. As regards advances made by a stockholder over and above the amount of his subscription, he may stand on an even footing with outside creditors, but cer-

tainly not above them. In the case of a company's directors and officers, the objection is still clearer, for a director or officer occupies a fiduciary position. He should preserve the company's property for the benefit of its creditors and stockholders, and not sacrifice their interests to advance his own.

CHICAGO & ATCHISON BRIDGE Co. *v.* FOWLER, 55 Kan. 17 (1895). The plaintiff was a creditor of the Anglo-American Packing & Provision Company. Fowler was one of the latter concern's officers. The packing and provision company, being heavily in debt to some of its officers and stockholders (among them Fowler), assigned its property to Fowler. He divided it among such officers and stockholders as were creditors of the concern. The plaintiff sued Fowler, who had thus preferred himself and the other insiders, for what would have been its proportionate share in an equal distribution of the insolvent company's assets. *Held* that the plaintiff should recover, but that, in computing what each creditor should properly have been paid, Fowler was entitled to his proportionate share on his own claim.

379. As a general rule, the effect of the appointment of a receiver to wind up the affairs and distribute the assets of a corporation is to pass the title to all its property to the receiver in trust for the creditors, the stockholders, and other interested parties. But of course this general rule may be modified by the terms of the appointment or by a statute governing the subject. The receiver, in such a case, succeeding to all the property rights of the corporation, is usually empowered to collect, by suit if necessary, all its assets and to ascertain and pay its liabilities. Throughout, he is under the direction of the court.

ATTORNEY GENERAL *v.* CONTINENTAL LIFE INSURANCE COMPANY; APPEAL OF EDWARD J. HANCE, PURCHASER, 94 N. Y. 199, (1883). The receiver of the insurance company put up at public sale thirty-six shares of the stock of the Atlantic National Bank. This bank had failed. Hance bid in the stock for \$107. It afterwards appeared that the directors of the bank had been declared person-

ally liable for the market value of the stock at the time the bank failed. This made the thirty-six shares worth about \$27,000. Hance applied to the court for confirmation of the sale, which was refused. *Held*, on appeal, the court had a right to refuse confirmation. Although the contract was a complete executory contract of sale, yet it was a receiver's sale and subject to the court's approval, without which no title could pass.

380. The duties of receivers and assignees for the benefit of creditors vary greatly with the circumstances of a given case. For instance, a receiver may be appointed to tide a corporation over a period of stringency or of reorganization, where it is necessary, as in the case of a railroad or other public service company, to operate continuously over a financial crisis. In such case, the purpose of the receivership being not liquidation and winding up, but temporary operation, different business principles regulate the management of the property. Yet the trust is still, ultimately, for the benefit of the company's creditors and stockholders. The crisis necessitating the receivership being past or the financial reorganization being completed, the receiver's duty is to account for his trust and to secure his discharge therefrom.

381. In the case of a receiver or assignee appointed to liquidate and to wind up the affairs of a corporation, complicated questions of priorities in payment arise under state and Federal statutes. The usual order of payment of claims is as follows: (1) Judicial costs of the receivership proceedings. (2) Taxes due the state or the United States. (3) Liens of mortgages, judgments, and attachments are next to be paid off, because of the general rule that the receiver takes over the property subject to all valid existing liens. (4) The necessary charges incurred by the receiver in preserving or operating the property of the corporation, including compensation to the receiver for his services and rentals falling due during his occupation.

Under the statutes of many states material men, contractors for building, and workmen are given priority in payment. (5) The unsecured creditors of the company now come in, if there is anything more to divide. In case there is not enough to pay them in full, they receive a dividend proportionate to the amounts of their respective claims. (6) If any balance is left, it should be paid to the stockholders, who are the proprietors of the company.

382. The final duty of a receiver or assignee is to draw up an account showing the management of his trust and the amounts received and disbursed by him. This account is usually laid before those who appointed the receiver originally. If he was appointed by a court, he accounts as a rule to that court. Upon the approval of his account, he may usually secure a discharge from further responsibility.

QUESTIONS

1. May a corporation make an assignment for the benefit of creditors when the act of the legislature incorporating it does not expressly grant it power to do so?

2. Does it require the consent of the stockholders in order to make valid an assignment for the benefit of a company's creditors?

3. Does an assignment for the benefit of creditors terminate the life of a corporation?

4. In your state, may a creditor of a corporation be its assignee for the benefit of creditors?

5. May receivers of corporations give a preference to certain of the company's creditors?

6. Wray was a stockholder in the Consolidated Cigar Company. During a period when business was dull, Wray loaned the company \$500. The corporation failed and Wray proved his claim against it for \$500. Johnson, who had sold the company some tobacco, sought to have payment of Wray's claim for \$500 postponed till after outside creditors had been paid in full. Could this be done?

7. In what order are the assets of an insolvent corporation usually distributed under state laws?

CHAPTER XXII

BANKRUPTCY PROCEEDINGS UNDER UNITED STATES LAWS

383. The main purposes of the Federal Bankruptcy Statute of July 1, 1898, are two. First, to provide for a just distribution of an insolvent debtor's assets among his creditors by preventing him both from keeping his property altogether out of his creditors' reach, and from paying any creditor more than that one's fair share. Second, to free a worthy debtor from the hopeless burden of his debts and therefore to permit him to wipe clean his slate and to start anew after financial failure. An insolvent individual may voluntarily petition to be adjudged a bankrupt and to receive the benefits of the statute upon handing over to the proper officer of the court his entire assets for equitable distribution among his creditors. Again, under some circumstances he may be adjudged a bankrupt upon the petition of certain of his creditors, and may be ordered by the court to deliver over his assets to its officer.

(A) What corporations are subject to the Bankruptcy Statute?

384. Such is, briefly stated, the intent and initial operation of the Bankruptcy Statute as to individuals; as to corporations, the situation is in the nature of things somewhat different. The chief reasons for extending the scope of the Bankruptcy Statute to corporations is to prevent their assets from being concealed or illegally transferred, and to provide for a fair division of them among the parties

entitled thereto; for Congress is not specially concerned about freeing a worthy corporation from a hopeless burden of debts. Therefore, no corporation may voluntarily petition to be adjudged a bankrupt. Moreover, only certain classes of corporations specified in the Bankruptcy Statute may be adjudged involuntary bankrupts.

385. The statute defines as follows what it means when it speaks of a corporation. "Corporations shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals and partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." It is to be noticed that certain limited partnerships and partnership associations, to be described in Part X, are included under the head of corporations, and are to be treated as such, so far as concerns the Bankruptcy Statute.

386. The classes of corporations which are permitted to be adjudged bankrupt are those engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits. If, as sometimes happens, a corporation does several kinds of business, some kinds within the above enumerated pursuits and some outside of them, it may be difficult to say whether or not the statute applies. It is held to apply, however, where the total business done within the specified pursuits exceeds the total done outside.

387. Besides, it is by no means easy to determine whether the business of a given corporation is described by one of the specified classes. It has been held, for example, that bridge building is "manufacturing" within the meaning of the statute in a case where a corporation not only put bridges together, but also made some or all of the parts so put together; not so, however, if it simply assembled parts made altogether by others. Ore smelting has been held to be "manufacturing."

388. Numerous questions have arisen as to what businesses are included under the class of "trading" corporations, and the general principle to be gathered from the decisions is that buying and selling for the purpose of gain is the basic idea underlying this word. The phrase "mercantile pursuits" has been considered by the courts to mean very much the same thing as "trading," though possibly on a larger scale. A stock brokerage corporation which bought and sold grain as well as securities has been held to be a "trading" corporation. "Printing" and "publishing" have not given rise to so many questions, but it is to be remarked that these words do not include a business in which the printing and publishing of advertising or other matter is done only incidentally. "Mining" includes quarrying.

(B) Starting the bankruptcy proceedings

389. Bankruptcy proceedings against corporations chartered in this country must be brought in the United States District Court for the district in which the alleged bankrupt has been domiciled or had its principal place of business for the six months, or the greater portion thereof, previous to the commencement of the proceedings. A corporation may have its principal place of business outside of the state which created it. Moreover, if a corporation has its domicile and its principal place of business outside of the United States, and has property within the jurisdiction of a Federal District Court, bankruptcy proceedings may be brought against it in such court.

390. And if a corporation is formally dissolved (see Chapter XXIV) at any time after the commission of an act of bankruptcy, the jurisdiction of the District Court is not thereby taken away, but that court may still take charge of and administer the corporation's assets as if it were still in existence.

391. Any insolvent corporation of the above-described classes which owes \$1,000 or over may be adjudged a bankrupt upon the petition of three or more creditors whose claims altogether amount to \$500 or over, or if all the creditors of the corporation are less than twelve, then one of the creditors whose claim amounts to \$500 or over may file such petition alone. The petition must set forth the facts showing that the court has jurisdiction and must aver that the corporation has committed an "act of bankruptcy," at some time within the four months preceding the date when the petition is filed.

392. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

393. An admission of insolvency, as described in subdivision (5) of the preceding paragraph, has been objected to as a ground of bankruptcy proceedings against a corporation. It has been contended that for a corporation to make such an admission and to express its willingness to

be adjudged a bankrupt practically amounts to voluntary bankruptcy, a privilege not intended to be offered to corporations by the Bankruptcy Statute. The courts have overruled this objection, holding that a corporation may not only admit its insolvency for the purpose of being adjudged a bankrupt, but it may even solicit three of its *bona fide* creditors to file a petition against it on the strength of such admission.

394. The agent through whom a corporation commits an act of bankruptcy should be acting within the scope of his powers, and should be acting for the corporation and not for private purposes of his own. If, for instance, an officer of an insolvent corporation were to embezzle some of its assets for his own purposes, this act could not justly be imputed to the corporation so as to make it guilty of having transferred part of its property with intent to defraud its creditors.

395. The procedure in the liquidation and distribution of the company's assets is the same as in the case of an individual. At the time a petition is filed, application may be made to the District Court for the appointment of a receiver, if necessary to preserve the company's property, until the election of a trustee. It is within the court's discretion to grant such an application, provided sufficient security is furnished by the applicant for the payment to the alleged bankrupt of costs, expenses, and damages caused by this taking of property in case it is later decided that it should not be adjudged bankrupt.

396. The alleged bankrupt may deny some or all of the facts averred in the petition, and may demand the benefit of a jury trial to determine whether or not it has committed an act of bankruptcy. If, however, the facts alleged in the petition are found to be true, the court adjudges the debtor a bankrupt and refers the case to an officer appointed by the court called a Referee in Bankruptcy. It

thereupon becomes the bankrupt's duty to prepare schedules, showing in detail all its assets and all its liabilities.

(C) Concluding the bankruptcy proceedings

397. The next step in the proceeding is the first meeting of creditors at which the bankrupt appears (in the case of a corporation usually in the person of one of its officers) for examination. The creditors' claims, which are duly presented, are allowed, unless some valid objection is made to them, and one or three trustees are elected by the vote of a majority in number and amount of the creditors whose claims have been allowed. The claim of every creditor must be presented for allowance and sworn to on a prescribed form. Creditors may present their claims at any time within one year from the adjudication.

398. The duty of a trustee is to take charge of the liquidation and distribution of the bankrupt's estate, and to keep careful accounts of his administration. As a rule, all the bankrupt's property is sold at public sale and the sale is made subject to the court's approval. If the trustee's accounts show more than enough money in hand to meet all the expenses of the bankruptcy proceedings, the balance is distributed among the company's creditors. If the creditors are paid in full, the balance goes to the stockholders.

399. Not less than one or more than twelve months after the adjudication, the bankrupt may petition for his discharge. The effect of the granting of a discharge is to free the bankrupt of all the debts which he has set forth in his schedule, except taxes and liabilities for such misconduct as fraud, embezzlement, etc.

400. The discharge of a corporation in bankruptcy does not discharge those who may be liable for the company's debts as sureties or guarantors. Of course, any individual who becomes insolvent through a company's failure may

file his own bankruptcy petition and, after complying with the requirements of the Bankruptcy Statute, secure a discharge for himself.

QUESTIONS

1. What are the twofold purposes of the Federal Bankruptcy Statute?

2. What was the main reason for including corporations within the terms of the Bankruptcy Statute?

3. What classes of corporations may be adjudged bankrupt?

4. The Cairo Contracting Company was insolvent. Some of its creditors endeavored to have its effects administered through the United States bankruptcy courts. The receiver of the company, appointed under the laws of the State of Illinois, objected. It appeared that the business of the company was solely that of erecting concrete buildings. The creditors contended that it was a manufacturing company within the meaning of the Bankruptcy Statute. How would you decide the case?

5. What is meant by a "trading" corporation?

6. How and where are proceedings started to put a corporation into bankruptcy?

7. The Acme Chemical Company was a corporation chartered in New Jersey. The company was insolvent and had been declared dissolved for not having paid its state taxes for two years. A receiver had been appointed to wind up its affairs. In answer to a petition in bankruptcy against the corporation, the receiver pleaded that the dissolution of the corporation took away the jurisdiction of the bankruptcy courts, there no longer being such a corporation in existence. Is this a sufficient answer?

8. What are the acts of bankruptcy? May a corporation commit the fifth act of bankruptcy?

9. Outline the steps taken in putting a corporation through bankruptcy.

CHAPTER XXIII

THE TERMINATION OF SOLVENT CORPORATIONS

(A) By expiration of the charter

401. When in the statute law under which a corporation is formed, or in its charter, a time limit is fixed for the life of the corporation, it is dissolved upon the expiration of that time without action by the legislature or the courts. None of its corporate powers can thereafter be legally exercised, save such as are necessary to the orderly settlement of its affairs.

PEOPLE *v.* ANDERSON *et al.*, 76 Cal. 190 (1888). The state of California brought suit to restrain the defendants from collecting tolls on a wagon road. The franchise to do this had been granted for a period of fifteen years, which had expired. *Held* that the defendants had no longer any right to collect tolls.

402. When, however, no limitation of time is expressed and the charter is unconditional, a corporation granted the power of perpetual succession has the right to exist forever. In fact, it has been held by the highest authority that a state lacks the power to extinguish the life of a corporation of this kind, because such extinguishment would involve a breach of the contract between the state and the incorporators. Accordingly, many old charters granted without limitation of time or other condition and consequently irrevocable by the state, are highly valuable; the more so because the states now generally impose limitations or con-

ditions upon the lives of the corporations created by them. At the present time when a state grants a charter, the right to amend or annul it, should occasion demand, is almost always reserved.

(B) By agreement of the members

403. A mere cessation of business by a corporation does not necessarily operate as a dissolution. The doctrine that a corporate charter is a contract between the state and the incorporators works both ways; and since the state cannot extinguish the life of a corporation in violation of such a contract, so the corporation cannot properly put an end to the performance of its duties under the contract without the consent of the state.

BOSTON GLASS MANUFACTORY *v.* LANGDON, 24 Pick. (Mass.) 49 (1834). Langdon brought suit on a promissory note given by the Boston Glass Manufactory, a corporation. The defense set up was that the corporation, having made an assignment of all its property to assignees for the benefit of its creditors, and having omitted for several years to elect officers or hold meetings, had expired and could not therefore be sued. *Held*, the charter was a compact between the government and the corporators, and this compact could not be ended without the consent of the former as shown by the government's acceptance of a surrender of the charter.

404. There is of course far more reason for such a rule in the case of corporations rendering a public service, such as railroad, or lighting, or power companies, in the continuous operation of which the public, represented by the state, may have a substantial interest. As to corporations organized for the conduct of purely private business, the necessity for the acceptance by the state of the surrender of the charter is far less.

ATTORNEY GENERAL *v.* SUPERIOR, ETC., R. R. Co., 93 Wis. 604 (1896). The Attorney General on behalf of the state sued the

defendant railroad alleging that, although its charter and franchises were granted in 1871, it had never completed its works or given public service and contending that the railroad had thereby surrendered its franchises and ought to be dissolved. *Held*, this mere non user did not dissolve the defendant in the absence of a statutory provision to that effect. Positive action on the part of the state is necessary to dissolve a corporation organized to render public service.

405. Where, as is often the case, a corporation is organized for the doing of some particular work, such as the building of a bridge or a tunnel, no further reason exists for its existence when that particular work is done. It may therefore surrender its charter to the state which granted it, but, as before observed, it is not dissolved by simply ceasing to do any business.

406. So important an act as a surrender of the charter is not within the power of the directors unless they have been especially authorized for this purpose by the stockholders. A majority of the stockholders, however, may ordinarily, unless some controlling law prohibits or requires more than a mere majority, or even unanimity, bind the corporation by their vote of consent to such surrender, provided, of course, there is no fraud upon the minority.

WINDMULLER v. STANDARD DISTILLING, ETC., Co., 114 Fed. (U. S.) 491 (1902). The plaintiff was a minority stockholder of the Spirits Distributing Company of whose stock the defendant had a majority. The directors of the Spirits Distributing Company (elected by the defendant) decided to dissolve the company. This decision was ratified by vote of the majority stock held by the defendant. Windmuller sought to prevent the dissolution. *Held*, the necessary formalities having been observed and the necessary majority of stockholders having consented, the court would not interfere.

407. The essential steps in the process of the surrender by a corporation of its charter may in general be laid out

as follows: First, the directors, having decided upon the advisability of ending the company's life, should send out notices to the stockholders of a meeting to be held for the purpose of receiving their vote on the question of dissolution. Then, the meeting having been held and the required majority having been obtained, the surrender of the charter should be put in writing, signed by the proper corporate officers and sealed with the corporate seal. This document must contain information of the financial condition of the company, showing in particular how creditors have been taken care of. In many states certain public advertisement of the forthcoming dissolution is required. This formal surrender must be accepted on behalf of the state by some body, usually the legislature or court, and upon such acceptance the life of the corporation ceases.

408. In some states it is provided that the formal offer of surrender of the corporate charter shall be made in the shape of a petition to the court of the county where the chief office of the corporation is situated. If after examining the facts in the case the court is satisfied that no persons interested will be prejudiced by granting the petition, it decrees the desired dissolution, and thereupon the corporate existence comes to an end.

QUESTIONS

1. When the statute under which a corporation is chartered fixes a time limit to the life of the corporation, is the corporation *ipso facto* dissolved at the expiration of the time named or must proceedings be taken to declare the corporation terminated?
2. Why cannot a state repeal a charter of a corporation which it has granted without reserving the right of repeal?
3. How is a corporation dissolved by agreement of the members? Must the state consent to this dissolution?
4. The State of Louisiana was about to erect some jetties in the Mississippi River in order to deepen one of the river's mouths.

Several contractors organized the Southern Jetty Company for the sole purpose of erecting these jetties. The contract was awarded to the company and the work was completed. Then the corporation surrendered its charter to the state, but no action was ever taken thereon by the state. Several years later the former president of the company sued it for a portion of his salary. It was pleaded that the company had been dissolved. Is this so?

5. Is it necessary to have the consent of all the stockholders in order to make a valid surrender of the charter?

6. Give the essential steps in the process of the surrender of a corporate charter.

CHAPTER XXIV

GOVERNMENTAL PROCEEDINGS TO ANNUL A CHARTER

409. Another way by which a corporation may be dissolved is through the forfeiture of its charter. Where a corporation has either abused or failed to exercise certain of its powers and franchises, or has defaulted in the performance of certain conditions upon which its charter was granted, the state which gave life to the corporation may reclaim the charter. To do so, it must, as a general rule, institute proceedings by a writ of *quo warranto* and obtain the judgment of a court of competent jurisdiction. All this will be considered in detail.

PEOPLE *v.* KANKAKEE RIVER IMPROVEMENT Co., 103 Ill. 491 (1882). The Kankakee River Improvement Company was incorporated by the State of Illinois. In 1865 the Illinois Legislature passed a law amending the company's charter, and, among other things, directing the company to lock and slack water the Kankakee River between certain points within eight years. The company failed to comply with that requirement, and the Attorney General brought *quo warranto* proceedings to dissolve it. *Held*, the above-named provision was a positive mandate involving the public welfare. The failure to obey it would subject the corporate charter to forfeiture.

410. Although this mode of dissolution has been the subject of frequent legislation, the statutes are, for the most part, merely declaratory of the common law. We shall therefore consider the rules laid down under the com-

mon law and, as we proceed, point out wherein the statute law has altered them.

(A) The several grounds of forfeiture

411. When a state creates a corporation, it grants there to certain powers and privileges which do not belong to persons of common right, and in return it may justly expect that the corporation will use such powers and privileges properly and in good faith. Therefore, when a corporation has been guilty of an act or omission which is harmful to the public, the state is released from its contract and may take back what it has given. The legal principle on which a corporate charter can be forfeited is that the law adjudges that the body corporate has broken the condition upon which it was chartered, and thereupon the incorporation is void.

1.—MISUSER OF CORPORATE POWERS AND FRANCHISES

412. The parties specially interested in the condition referred to in the preceding section are the state and the corporation. Out of the contract between the state and the corporation there arises a relation of trust and confidence. The greater the powers and privileges conferred upon the corporation, the more imperative that it should act in good faith. One cannot presume that the state, which is the constituted agency of the people, will grant to a certain body of men power to injure the public.

COMMONWEALTH *v.* COMMERCIAL BANK, 28 Pa. 383 (1857). The Commercial Bank was a corporation organized under Pennsylvania laws to do a banking business. Its charter prohibited it from making loans at a greater rate of discount than one-half of one per cent for thirty days, and from dealing in promissory notes. The Commercial Bank, in conducting its business, utterly disregarded these restrictions. The Attorney General brought *quo warranto* proceedings to

dissolve the Commercial Bank. *Held*, the acts complained of were a violation of the fundamental conditions upon which the charter was granted, and the state had a right to demand the dissolution of the offending corporation.

STATE v. STANDARD OIL CO., 49 Ohio 137 (1892). The Standard Oil Company, a corporation organized under Ohio laws, entered into a trust agreement with a number of other oil refining companies. The purpose of this agreement was to form a monopoly and thereby throttle competition. The State of Ohio, by its Attorney General, sued out a writ of *quo warranto* to dissolve the Standard Oil Company, on the ground that it had abused its corporate franchises by becoming a party to an agreement against public policy. *Held*, the corporation should be dissolved.

413. Not every misuser or abuse of corporate powers and franchises amounts to an act of forfeiture. Acts of misuser, to constitute a breach of contract, must involve matters which are of the essence of the contract between the state and the corporation. The abuse or misuser must be injurious to the welfare of the public at large or of that part of the public with which the particular corporation comes in contact. The public must have an interest in the act done or omitted to be done. If it is confined exclusively to the corporation, and in no wise touches the community, it cannot be regarded as virtually affecting those conditions upon which the charter was granted.

414. Moreover, even though the community is affected, yet if the misuser was due to accident or mistake, a dissolution will not be required. The encouragement of useful, legitimate, and well-conducted corporations, is a recognized policy of the state. Now, if the courts were to decree the dissolution of a corporation for every misuser or nonuser of corporate powers and franchises, corporate existence would become so precarious that this policy would be defeated. Besides, the public seldom suffers real harm, beyond a momentary inconvenience, from a single and ac-

cidental nonuser, and a misuser ordinarily causes even less trouble to the people at large. To merit forfeiture, the misuser must be willful and repeated. It has been held in a number of cases that if a misuser is repeated but not willful, the corporation will not be dissolved, but will be restrained from committing the misuser. To constitute an act of forfeiture, therefore, the misuser must be, first, injurious to the public; and, secondly, willful and fraudulent.

2.—NONUSER OF CORPORATE POWERS AND FRANCHISES

415. Much that has been said of misuser may be applied to the nonuser of corporate powers or franchises. There is an implied condition in every charter that the corporation shall operate thereunder. If a corporation fails to organize within a reasonable time, or, having organized, fails to run its business for an unreasonable length of time, it will subject its charter to forfeiture. What constitutes a reasonable or an unreasonable period of time depends upon the circumstances of each particular case.

STATE v. CAPITAL CITY WATER Co., 102 Ala. 231 (1893). The Capital City Water Company was a corporation organized under Alabama laws. Its charter imposed upon it the duty of furnishing the city of Montgomery and the residents thereof with a sufficient supply of pure water for domestic and other purposes. For three years, the water company failed to perform this duty. The Attorney General of Alabama instituted proceedings to annul its charter. The company attempted to justify the nonuser upon the ground that it had been about to enlarge its works when the city of Montgomery declared its intention to exercise its option to purchase the said works, whereupon the said corporation had ceased operations. *Held*, the nonuser of the corporate franchises as alleged was sufficient to forfeit the corporate charter. The excuse offered by the company did not justify the neglect of its duties.

PEOPLE v. PITTSBURG RAILROAD Co., 53 Cal. 694 (1879). The stockholders of a coal mining company, in order to obtain conven-

ient transportation of their coal, organized the Pittsburg Railroad Company under California laws. The purpose set forth in the corporate charter was to transport freight and passengers. Upon this representation, and in the belief that the land was required for public use, the corporation was given the right of eminent domain. The railroad, however, was operated merely for the purpose of transporting coal. The state instituted proceedings to dissolve the corporation because it was guilty of a nonuser of that part of its powers under which it should have carried passengers; and (2) because the right of eminent domain having been granted upon the inducement that the company would exercise its franchise to haul passengers, the failure to do so was a fraud upon the state. *Held* that the charter was forfeitable for the reasons alleged.

416. A nonuser, to be an act of forfeiture, must be harmful or prejudicial to the public. A mistaken or accidental nonuser is not so likely to occur as a mistaken or accidental misuser; for, when a corporation is created for a certain specified purpose, the officers can hardly fail to realize that they should actively endeavor to achieve such purpose. If the failure to perform the company's duties proves injurious to the public, the corporation may be dissolved. The inability of a corporation, by reason of its insolvency, to perform its public duties does not excuse the corporation in a proceeding to dissolve it.

3.—STATUTORY GROUNDS OF FORFEITURE

417. Many states have enacted laws providing special grounds of forfeiture. In hardly any two states are these laws the same, but many of them declare that the corporate charter will be forfeited if the corporation fails: (1) To organize within a certain time; (2) to begin business within a certain time; (3) to pay its state taxes; (4) to hold meetings within a certain length of time; (5) to maintain an office and keep certain records within the state; (6) to collect a certain percentage of its capital stock

within a designated time; (7) to file at certain periods with an appointed state official a statement of its financial condition, etc. As a general rule, such laws do not, in the absence of express provision, dissolve the corporation *ipso facto* in the event of its failure to obey them.

4.—CONDONATION BY THE STATE

418. The right of a state to demand the forfeiture of a corporate charter for one or more of the above-named causes may be waived by it. If after an act of forfeiture has been committed the legislature passes a law which recognizes, either expressly or impliedly, the existence of the corporation, the forfeiture is waived. But the fact that the state has for a length of time submitted to acts of forfeiture without moving against the offending company will not usually constitute a waiver.

PEOPLE *v.* OTTAWA HYDRAULIC Co., 115 Ill. 281 (1886). In 1849 the State of Illinois incorporated the Ottawa Hydraulic Company. This concern, instead of carrying on the work specified in its charter, conducted a business of an entirely different kind. In 1853 the legislature of Illinois passed an amending act which enlarged the company's powers. In 1884 the Attorney General sued out a writ of *quo warranto* to dissolve the company on the ground that it had failed to use its corporate powers and assumed those which were not given to it. *Held* that even though the corporation had been guilty as complained, nevertheless the act of 1853 waived the right of forfeiture.

419. Even without any legal waiver which bars a state from imposing the penalty of forfeiture, mere inaction on the state's part often saves an offending corporation. Where there is no clear need to punish a company for noncompliance with some of the technical rules governing it, the state officials often display wisdom in refraining from action. In our highly organized system of laws reg-

ulating business, there is such a complex network of requirements that one is in constant danger of violating this or that statutory enactment. Now to punish every disregard of statute would result in stigmatizing almost every private citizen and every corporation as a malefactor. Therefore, it is proper for the state to regard corporations with parental care, recognizing their necessity under modern conditions. They should be kept within proper bounds, but the legislator who keeps looking eagerly for an opportunity to destroy them, is the foe of organized progress.

(B) Judicial proceedings to annul a charter

420. As a general rule, when a corporation has committed an act of forfeiture, the corporation is not thereby *ipso facto* dissolved. It has merely subjected its charter to forfeiture, and it remains with the state to prosecute the corporation to dissolution. The usual course is to bring *quo warranto* proceedings to inquire by what warrant the members now exercise their corporate powers, having rendered their charter liable to annulment.

421. There are several exceptions to this rule. In a few instances, the charter of a corporation or the laws under which it was created provide that the corporation, upon the commission of an act of forfeiture, shall thereby be at once dissolved. If the wording of such provisions can be given a different construction, the courts usually hold that a formal prosecution by the state is necessary to dissolve an offending company.

422. The statutes of many states provide that a corporation may be dissolved for certain acts or omissions by proclamation of the governor. This enables many charters to be annulled each year for nonpayment of the annual taxes or fees or for other violations of law. In the absence of statute, the state that chartered a given corporation is

the only proper party to institute *quo warranto* proceedings to dissolve the corporation. Another state or an individual cannot properly take such a step. In a few cases private individuals are given statutory authority to attack a corporate charter by a complaint to the Attorney General, who may then bring *quo warranto* proceedings in the name of the state.

QUESTIONS

1. When and by what proceeding may a charter be forfeited?

2. On what legal principle may a charter be revoked?

3. The Washington Insurance Company was chartered to do a fire insurance business. Five years after commencing business the company began to write life and accident insurance policies. The Attorney General of the state sought to annul its charter. What arguments would you make for the Attorney General and for the corporation, and how would you decide?

4. What is a misuser of corporate powers? What must a misuser involve in order to constitute a breach of the contract between the state and the corporators?

5. Is it permissible for a company to obtain a charter granting certain powers affecting the public, such as eminent domain, and then to use only a few of its powers such as will further a private end?

6. The Susquehanna Bridge Company was incorporated to build and maintain a bridge over the Susquehanna River. For three years the company failed to complete a bridge across the river and suit was brought to dissolve it. The company pleaded that it was insolvent and that upon becoming solvent it would proceed to finish the bridge. Is this a good defense?

7. Name some of the statutory grounds of forfeiture.

8. How may the right to forfeit a corporate charter through the corporation's misconduct be lost by the state?

9. Who may institute *quo warranto* proceedings to annul a charter?

PART SEVEN

CONSOLIDATION OF CORPORATIONS

CHAPTER XXV

MERGER OF CORPORATE CHARTERS

423. A merger of corporate charters occurs where the rights, property, powers, and privileges of two or more corporations are, by the agreement of their stockholders acting under legislative authority, combined into a single corporation. The several corporations which thus combine are called the "constituent corporations," and the corporation which results from the combination is called the "consolidated corporation."

424. The words "consolidation," "merger," and "amalgamation," are nearly synonymous terms, and are frequently used interchangeably. But to avoid confusion, we shall distinguish them. The word "consolidation" will be used in a comprehensive sense, to indicate any combination whatsoever that may take place between two or more corporations. The word "merger" will be used in a more restricted and technical sense, to indicate the formation of one legal corporate entity with a single charter out of two or more corporate entities. "Amalgamation" is a term frequently met with in statutes and its meaning varies with its use.

(A) Requisites of merger

1.—LEGISLATIVE AUTHORITY

425. As we have already seen, a corporation is a creature of the state which chartered it. All its rights, pow-

ers, and privileges are derived from legislative grant. It follows, therefore, since a merger is consummated by either the creation of a new, or the remolding of an old corporation, that legislative authority is necessary. The authority for every valid merger must be traceable to an act of legislation. This legislative authority may be granted in the enabling act under which the constituent corporations were created, or it may be granted subsequently thereto, or even after the merger has taken place, in which last case it legalizes what was before an illegal merger. Many states have enacted laws permitting certain kinds of corporations to consolidate.

426. Some mergers are positively prohibited. With few exceptions, monopolies, being in restraint of trade and against public policy, have for centuries been condemned by the law. Most states, therefore, which have laws permitting merger, have been careful expressly to forbid the merger of competing companies. For example, two railroad lines, or telegraph lines, or pipe lines, which are in competition for the business of the same localities are not usually allowed to consolidate. But this prohibition does not extend to connecting lines of railroads, etc., the merger of which is often very beneficial to the community.

427. In order to effect a valid merger, the legislative authority must be conferred upon each of the constituent corporations by the state under whose laws it exists. At the present day, nearly all corporations are created under general enabling statutes and are, at the time of their creation, vested with power to merge.

2.—METHOD OF MERGER

428. As in the case of an original incorporation, the acts authorizing merger of corporations must be strictly followed. The statutes generally prescribe the practice in

effecting a merger. The steps necessary to bring about a consolidation are usually as follows: (1) The directors of the constituent companies enter into an agreement, fixing the terms of the union, the amount of capital stock of the consolidated corporation, the number of shares and the par value of each, the mode of exchanging the stock of the old corporations for the new stock, and other necessary details. (2) This scheme is submitted to the stockholders of each company at a meeting called for the purpose, of which due notice must be given. A vote is taken, and if a majority of stock in each company favors the merger, then (3) a certificate is filed with the Secretary of State, at the state capital. (4) The certificate, with copies of the agreements of the stockholders annexed thereto, is presented to the governor of the state and, if approved, signed by him. Certain fees are paid, and the merger is then complete.

3.—AGREEMENT OF STOCKHOLDERS

429. It will be remembered that the charter of a corporation involves a contract among the original members. Any change in this fundamental compact should therefore be submitted to the stockholders for their approval.

430. Is the assent of all the stockholders of a corporation necessary to effect a merger? The protection of the United States Constitution, forbidding the states to impair contractual obligations, extends to each and every stockholder, and before general enabling statutes were passed by the several states, the unanimous assent of the stockholders was a necessary condition precedent to merger. This remains true to-day as to most corporations created before such statutes were passed.

BOTTS v. SIMPSONVILLE TURNPIKE Co., 88 Ky. 54 (1888). In 1884 the legislature of Kentucky passed an act authorizing the Simpsonville Turnpike Company and the Fisherville Turnpike

Company, both Kentucky corporations, to merge. The act provided that when the agreement of the directors of both companies should be ratified by a majority of the stockholders of both companies, the consolidation would be completed. When the two corporations were created, there was no law in the state reserving the power to alter or amend their charters, nor was there any provision in the charters concerning consolidation. Botts, a stockholder of the Simpsonville Turnpike Company, sued to prevent the consolidation. *Held* that the consolidation of the two corporations was a departure from the scope of their charters, and that the unanimous assent of the stockholders was necessary. The act of 1884 was an infringement of the stockholders' original contract and therefore void. The merger was forbidden.

TUTTLE v. MICHIGAN AIR LINE Co., 35 Mich. 247 (1877). In 1866 the State of Michigan incorporated the Grand Trunk Railroad Company. Tuttle was one of the subscribers to the stock, and part of his subscription remained unpaid. The state had not, either by law or in the charter, reserved the right to alter or amend. In 1870 an act was passed authorizing the consolidation of the Grand Trunk Railroad and the St. Joseph Valley Railroad Company. Tuttle refused to assent to the consolidation. The companies, however, joined forces and formed the Michigan Air Line Company, which, under the above-mentioned act, succeeded to the rights of the two constituent companies. The new corporation then called in the unpaid stock subscriptions of the old companies, and sued Tuttle, who refused to pay. *Held* that the law of 1870 which authorized consolidation without the assent of all the stockholders was a violation of the original contract among the stockholders; that the consolidation was therefore null and void; and that Tuttle was not liable.

431. The great majority of companies, however, are subject to the modern laws. Since the decision of the United States Supreme Court in the famous Dartmouth College case, most of the states have reserved the right to alter or amend the charters of corporations. The stockholders enter into their contract, and the charter is granted, subject to these laws. Therefore, any alteration in the

charter of a corporation, such as merger would effect, even though some stockholders oppose it, is not necessarily a violation of the United States Constitution.

432. The same result is reached when the authority to merge appears in the charter of a corporation. In such case, the unanimous assent of the stockholders is very seldom necessary. The charter of a corporation represents the agreement of the stockholders among themselves. A merger, therefore, without the unanimous assent of the stockholders, is not a violation of their original contract; for the terms of the contract itself, as expressed in the charter, provide that this may be done.

HANNA v. CINCINNATI AND FORT WAYNE RAILROAD Co., 20 Ind. 30 (1863). In 1853 a corporation was organized, under a general law of Indiana, to build and run a railroad. This law reserved the power to amend or repeal the charter at the legislature's discretion. Hanna was one of the original subscribers for stock. Subsequently, a law was passed authorizing consolidation of connecting lines of railroad; under which law the corporation effected a merger with another, forming the Cincinnati and Fort Wayne Railroad Company. It was apparent from the original articles of association that such consolidation was one of the purposes for which the constituent corporations were formed. Hanna refused his assent to the merger, and was sued by the consolidated company for unpaid subscriptions. *Held* that, as the merger was only carrying out one of the purposes for which the company was originally formed, the assent of a bare majority of the stockholders was enough to sanction a consolidation. Hanna was, therefore, liable to the consolidated company for his unpaid subscriptions.

433. The number of assenting stockholders required to sanction a merger is generally specified in the charter or in the statute by authority of which the merger is made. In most states, two thirds or three fourths of the outstanding stock must be voted in favor of it, otherwise the merger resolution is lost. If no such provision is made, a bare

majority will suffice under the laws generally prevailing to-day. Statutes in a number of states provide for the purchase by the consolidated corporation of the shares of dissenting stockholders.

(B) Effect of merger

434. The effect of a merger depends upon the statute under which it is made. The result of the merger may be one of two different things. (1) The creation of a new corporate entity having a distinct and separate legal identity in place of the old constituent corporations, which are all thereby dissolved. (2) The preservation of one of the constituent corporations and the merger into it (and consequently the dissolution) of the other constituent corporations.

435. When a merger is consummated, the consolidated corporation is the same as any other corporation. Its constitution depends upon the consolidating act, which usually provides that the consolidated corporation shall succeed to the rights, property, privileges, immunities, and obligations of the constituent corporations. This is the result, by implication, even if there is no such provision. The charter of the consolidated corporation is a conglomeration of the charters of all the constituent corporations, unless the contrary is stipulated.

436. Contractual and other claims acquired by merger may be sued on by and in the name of the consolidated corporation. The payment of all unpaid subscriptions due by the stockholders of the constituent corporations may be enforced by the consolidated corporation. It succeeds also to the right of eminent domain vested in any of the constituent corporations. But any exemption from taxation extends only to the property of the particular constituent corporation which had that right.

437. The consolidated corporation is burdened with the obligations of the constituent companies, at least to the extent of the property which it acquired from them. However, the creditors of a constituent corporation need not accept the liability of the consolidated corporation. By a well-established rule of law, debtors cannot transfer their liability to others, and thereby discharge themselves. If the debtor constituent corporation is still in existence, its creditors may sue it. If it has been dissolved by the merger, its creditors may satisfy their demands out of the property in the hands of the consolidated corporation.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Co. v. MOFFITT, 75 Ill. 524 (1874). The Peoria Valley Railway Company built a bridge over a stream. Subsequently it executed a lease of its road to the Chicago, Rock Island and Pacific Railway Company. The old bridge was damaged by a freshet and the Peoria Company built a new bridge, but negligently failed to remove the piers of the old bridge. In consequence, waste drifted down and gathered there. The stream was blocked up, overflowing Moffitt's land and causing him damage. Shortly afterwards, the lessor and the lessee company consolidated under the name of the Chicago, Rock Island and Pacific Railway Company. No provision was made for the settlement of the liabilities of the constituent companies. Moffitt sued the consolidated company to recover for the damage to his property caused by the flood. *Held* that a consolidated corporation succeeds to all the rights, powers, duties, and liabilities of the constituent corporations, except so far as may be otherwise provided by the law under which the consolidation is effected. Moffitt won.

LANGHORNE v. RICHMOND RAILWAY Co., 91 Va. 369 (1895). Langhorne was injured by the Richmond City Railway Company, a Virginia corporation. Shortly afterwards, the Richmond City Railway Company, under an act of the legislature, merged with the Richmond Railway and Electric Company, forming the Richmond Railway Company. No provision was made as to the obligations of the constituent corporations, which were dissolved by the merger. Langhorne sued the consolidated company to recover for his

injuries. *Held* that a corporation, formed by the merger of two or more other corporations, succeeds to the liabilities as well as to the property of the old companies, unless another manner of settling their debts is expressly provided. The consolidated company was therefore liable

QUESTIONS.

1. What is a merger of two corporations?
2. Can a merger take place without the permission of the state creating the corporations?
3. Name some mergers which are prohibited by law.
4. Describe the steps usually necessary to bring about a consolidation.
5. In what corporations is the unanimous consent of the stockholders necessary to effect a merger? In dealing with such corporations, may the state provide that the assent of a majority is sufficient to ratify a merger?
6. What happens to the claims against one of the constituent corporations in case of a merger?

CHAPTER XXVI

THE CONTROL OF ONE CORPORATION BY ANOTHER

438. Besides the merger of charters, which is discussed in the preceding chapter, there are various other forms of corporate consolidation. The most notable of these are combinations effected (A) by a sale or lease of all the assets of one corporation to another, (B) by a corporation's acquiring a controlling interest in the stock of one or more other corporations, and (C) by a contractual alliance between two or more corporations. These will be treated in the order named.

(A) Sale or lease of corporate assets

439. Generally speaking, every business corporation, in carrying on its business, may sell or lease its property. The directors of most companies are empowered to enter into contracts for selling or leasing part of the corporate property. Where a corporation is in prosperous circumstances, the consent of a majority in value of its stockholders is necessary to dispose of all its property. Indeed, for this purpose, in some states, two thirds or three fourths in value of the stockholders must concur. If a corporation is insolvent, the action of the directors merely is often sufficient to authorize a sale or lease of all the corporate property. As a rule, no statutory authority is necessary, because the power of taking and selling property is inherent in every business corporation. It should be carefully borne

in mind, however, that the power to take property does not include the power to take stock of another corporation, for in such case statutory authority is requisite.

440. Where consolidation is effected by a sale of corporate assets the purchasing company usually pays a monetary consideration or issues to the selling company shares of its stock equal in value to the property received. The selling company may then dissolve, and, after payment of its debts, the money or stock so received is divided among its stockholders proportionately to the number of their shares.

441. Even a single dissenting stockholder of the selling company is often in a position to demand a monetary consideration for his shares, though all the other stockholders are willing to accept shares in the new company in exchange for their former holdings. But an exchange of stock for property is frequently effected, and there seems to be no practical objection to it if the parties agree.

442. If the stockholders of the selling company accept stock in the purchasing company, they then become stockholders of that concern, which continues the business of both corporations. This method of consolidation is obviously very simple and one quite frequently employed.

443. Consolidation through lease of assets is effected by one corporation's executing a lease of all its property to another corporation, and reserving to itself an agreed rental. This rental may be a fixed sum or a certain percentage of the money made by the lessee corporation. Here, however, the lessor corporation does not usually dissolve. It continues its corporate existence and performs the duty of collecting the rentals under its lease and paying them, in the shape of dividends, to its stockholders.

444. It has been said that no statutory authority is necessary to effect a sale or lease of assets. But the statement is true only as to alienable assets. This form of

consolidation is often adopted by railroads and public utilities corporations. Now, quite an important part of a railroad's assets is its franchises. A franchise, being a special privilege from the state, is not alienable save as expressly allowed by law. A sale or lease of all the assets of one railroad to another, without its franchises, would be of comparatively little use to the corporation taking merely the tangible property. In such cases, then, statutory authority is necessary to effect the transfer of a franchise. In most states, laws have been passed authorizing railroads to sell and purchase or to lease and take the property and franchises of a connecting line of railroad. And many states allow public utilities corporations, such as gas or water companies, to combine.

445. Where a sale or lease of corporate assets is followed by the dissolution of the selling or leasing company, its creditors can satisfy their claims out of its property in the hands of the purchasing or lessee company. Usually the consolidation agreement stipulates that the purchasing or lessee company shall be liable to fulfill the obligations of the one selling or leasing; and in such case the creditors of the latter concern may sue either it or the company taking the property. But where the transfer of corporate property is not followed by the dissolution of the selling or leasing company, its creditors' rights often remain the same as before the consolidation took place.

(B) Corporate stockholding and control

446. Corporate consolidation is frequently effected by one corporation's acquiring a majority of the stock of one or more other corporations. It has already been pointed out that a corporation, in the absence of statutory authority, cannot hold stock of another company. However, in nearly all the states certain kinds of corporations are given

a limited power of holding stock in other corporations. Thus insurance and many other companies are authorized to invest their surplus funds in stock of other corporations.

447. In New York, New Jersey, Delaware, and some other states laws have been passed enabling a domestic corporation "to purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of" the shares of domestic and foreign corporations. Under the authority given by these laws many corporations have effected a virtual consolidation by purchasing a majority of stock of those corporations which it is desired to unite. The directors of the purchasing corporation are then in a position, by means of their majority voting power, to control the constituent corporations and to direct their business.

448. The method of consolidation mentioned in the preceding section has been found so effective that corporations, created by states whose laws do not specially favor consolidation, have learned to look elsewhere for the accomplishment of their ends. The old plan of vesting in an individual or syndicate a controlling interest in the corporations which were to be consolidated was open to objection, and indeed, in certain cases had been declared unlawful by the courts, so a new plan was needed. The upshot of it all was the formation, in those states whose laws allow one company to hold unlimited stock in other companies, of a corporation for the sole purpose of holding stock in other corporations. This is known as a "holding company." A holding company is organized with a capital sufficient to buy up a majority of the stock of all the corporations which it is intended to combine, and its directors run all the constituent companies according to a single plan of business and to a common end.

449. Some of these combinations control a large part of that branch of business in which they are respectively engaged, and are popularly called trusts. The trusts are,

in great measure, a result of economic influences working for production on a big scale and at lessened cost. In this respect they tend to benefit the public at large.

450. Nevertheless, a free and lively competition, if not ruinous, may be distinctly favorable to the community. It often tends to increase production and to lower prices. Many courts, therefore, have declared that any combination of corporations or individuals the object of which is, or the necessary or natural consequence of which will be, the formation of a monopoly, the restraint of trade, and the control of the production and sale of marketable commodities, is against public policy and unlawful.

451. And if a trust has paid overmuch for the control of its subsidiary companies, it may be tempted to make ends meet by crushing or buying out all dangerous competitors and then artificially inflating prices. More than one of the trusts has yielded to this temptation, and the problem of regulating them is still unsolved. But in facing this problem one should remember that the movement toward consolidation is natural and healthy, and that only its abuses should be checked. To treat combination as inherently evil is to lay the ax to the root of all advancement which depends largely upon coöperation. See Sections 419 and 455.

(C) Corporate consolidation by contract

452. The term "corporate consolidation" is used broadly to indicate a consolidation between two or more corporations under an agreement which is entered into between them for their mutual advantage. The most common types of this form of consolidation are as follows: (1) Contracts for the division of business, according to a territorial line of demarcation or otherwise. Under such contract two or more companies sometimes agree to allot to

one another a proportionate amount of business coming to all of them and to share the profits arising therefrom on a fixed scale. (2) Agreements between industrial corporations regulating the production and selling prices of each of the several companies.

(D) Laws restraining consolidation

453. A combination of corporations may or may not be legal. It is illegal if it violates the rules governing the manner of organization and the powers of corporations. Thus, a combination amounting to a partnership between corporations is illegal, for such concerns lack the power to become members of a firm. Again, a combination which is against public policy or statute is illegal. The latter class of illegal combinations come more frequently before the courts, and the questions involved are often of great political and economic importance.

454. Neither the Federal Government nor the states have been content to rely entirely on the common law rules to determine the legality of a combination. The legislatures of nearly all the states have passed laws which declare combinations in restraint of trade unlawful and criminal, and impose penalties of fines and imprisonment upon persons, and forfeiture of their charters upon corporations, violating such laws. In many states, anybody who is personally injured by these combinations is given the right of redress. Most of this legislation is experimental, and much of it is so crude as to do more harm than good. See Section 451.

455. In 1890 Congress, acting under its constitutional power of regulating commerce among the several states, passed a statute familiarly known as the Sherman Anti-trust Law. This statute provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states,

or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person, or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished " as above.

QUESTIONS

1. May a corporation's directors contract to sell or lease all its property, when the corporation is solvent?
2. What is the usual procedure when consolidation is effected by a sale of corporate assets?
3. May stockholders in a selling company be forced to accept stock in the buying company as a consideration for the sale?
4. May a public service corporation lease its franchises without the consent of the state?
5. Discuss the rights of creditors of a company selling its property and franchises to another corporation.
6. Can one corporation own stock in another?
7. What is a holding company? Discuss the benefits and the harm flowing from trusts.
8. How may corporations consolidate by contract?
9. May a corporation be a member of a partnership? Give reasons.
10. What does the Sherman Anti-trust Law provide?

PART EIGHT

FOREIGN CORPORATIONS

CHAPTER XXVII

RIGHTS AND POWERS OF FOREIGN CORPORATIONS

456. The term "foreign corporations" includes not only corporations chartered by foreign nations, but also those organized by one state of the Union and seeking to do business in another state. The New York Code of Civil Procedure, Section 3343, Subdivision 18, draws the following distinction: "A domestic corporation is a corporation created under or by the laws of the state, or located in the state and created by or under the laws of the United States or by or pursuant to the laws in force in the Colony of New York before the 19th day of April in the year 1775. *Every other corporation is a foreign corporation.*"

457. Corporations engaged in foreign and interstate commerce, national banks and other corporations chartered by the Federal Government, are not considered in the present chapter because, for the most part, they are exempt from state interference. A corporation, being a mere creature of the state of its origin, has no legal existence outside of the state where it was incorporated, for the reason that state laws have no extraterritorial effect. But, by the rules of comity prevailing among the states, a corporation chartered in one state, as, for instance, West Virginia, may with the express or implied consent of another state, as New York, enter New York and freely transact business there through its officers and authorized agents. The consent of a state to the transaction of business therein by foreign

corporations will be presumed, unless it is contrary to the Constitution or statute law of the state or to its public policy.

458. The admission of foreign corporations into a state for the transaction of business therein is a matter entirely within the state's discretion. It may exclude a foreign corporation entirely, or restrict its business to a particular locality, or exact such security for the performance of contracts with its citizens, as, in its judgment, will best protect the public interest. If a state lets down the barriers and admits foreign corporations to transact business such corporations must strictly comply with the terms and conditions imposed by the state.

459. It has already been seen that the corporation laws of some states are more favorable than those of others. For this reason, residents of one state sometimes organize a corporation under the laws of another state more favorable to corporations, for the purpose of doing business in their own state. Such incorporation will generally be regarded as valid, unless it is an evasion and fraud upon the laws of the state of the incorporators' residence.

EMPIRE MILLS *v.* ALSTON GROCERY CO., 15 S. W. Rep. (Tex.) 505 (1891). The Alston Grocery Company, composed of Texans, obtained a charter in Iowa for the purpose of carrying on a mercantile business in Texas, as a corporation, which was absolutely prohibited by Texas laws. In a suit by a creditor, *held*, the rule of comity does not extend so far as to render valid the charter of a corporation obtained in another state for the sole purpose of doing business in Texas. The stockholders were therefore liable as partners to corporate creditors

460. In accordance with their right to exclude foreign companies entirely or to prescribe the terms upon which a foreign corporation shall enter for the transaction of business, all the states have passed laws differing in details,

but generally providing that no foreign corporation shall enter and do business without having filed a copy of its articles of association with a designated state official, usually the Secretary of State, and having obtained a certificate, permit, or license for the transaction of business. Moreover, it is usually required that a foreign corporation shall have one or more known places of business within the state, with an authorized agent or agents in charge thereof upon whom legal process may be served.

461. In some states, it is also required that a foreign corporation shall agree not to transfer suits from the state courts to Federal courts. Certain kinds of corporations, such as foreign insurance companies, are obliged to deposit a specified amount of funds or securities with a state official or department, for the protection of citizens of the state doing business with such foreign corporations.

462. Compliance with the provisions of these statutes is enforced by denying to offending corporations the aid of the state courts in enforcing contracts made within the state. In many states, officers and agents who neglect to comply with the local statutes render themselves liable to fine or imprisonment or both. Some states have also passed statutes which are retaliatory in character and exact from a foreign corporation in one state just what a corporation of that state would be required to give in the state of the foreign corporation's domicile. In other states, foreign corporations are placed upon the same plane as domestic companies and are subject to the same burdens and liabilities.

463. Foreign corporations are usually prohibited from *doing business* within the state until they have complied with the state laws regulating foreign corporations. The question whether or not a foreign corporation should have complied with these laws depends, therefore, upon whether or not it has been doing business within the state. Usually,

a single transaction between a foreign corporation and a person domiciled in another state is not regarded as a doing of business within the latter state even when the transaction is part of the corporation's ordinary business.

BLAKESLEE MFG. CO. v. HILTON, 5 Pa. Super. 184 (1897). The Blakeslee Manufacturing Company, an Illinois corporation, sued to recover the price of a steam pump sold to Hilton. The defense was that the pump was ordered from the Blakeslee Company's agent located in Bradford, Pennsylvania, and that the company was therefore doing business in Pennsylvania, and, not having registered there in accordance with the local statute, could not recover. *Held*, the words "doing any business" as used in the statute should not be construed to mean taking orders or making sales by sample, by agents coming into Pennsylvania from other states for that purpose. To hold otherwise would be to offend against the Constitution of the United States by imposing improper restrictions on interstate commerce.

464. A foreign corporation is not a citizen of a state or of the United States under those clauses of the Federal Constitution which provide that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." But a foreign corporation is a person within the meaning of the constitutional provision that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

PEMBINA CONSOLIDATED SILVER MINING & MILLING Co. v. PENNSYLVANIA, 125 U. S. 181 (1888). The Pembina Mining Company appealed from the assessment of the Auditor General and Treasurer of Pennsylvania of an office license tax of \$250, being one four-thousandth part of its capital stock, assessed under the Pennsylvania act providing that every foreign corporation, except foreign insurance companies, not investing capital in Pennsylvania

should maintain an office there and obtain from the Auditor General an annual license so to do; and should pay into the state treasury for said license a fee equal to one fourth of a mill on each dollar of its capital stock. *Held*, a private corporation is a person within the meaning of the Fourteenth Amendment to the United States Constitution, that "no state shall deny to any person within its jurisdiction the equal protection of the laws." But the Pennsylvania act did not infringe the constitutional amendment. It simply prescribed the terms on which a corporation might enter the state and do business. And until a corporation should comply with those terms, it was not entitled to the equal protection of the laws.

465. If a state allows a foreign corporation to do business within its borders, it must be presumed to have consented to the corporation's exercising all the powers conferred by its charter and the general laws appertaining thereto, unless the corporation is prohibited from so doing by the direct enactments of the state or by some rule of public policy to be deduced from the general course of its legislation. But the corporation's powers are nevertheless limited by its charter, and it cannot, therefore, do any acts or make any contracts which it could not do or make in the state of its origin. A state will not allow a foreign corporation to exercise therein any greater or more extensive powers than it could exercise in its home state.

DIAMOND MATCH Co. v. POWERS, 51 Mich. 145 (1883). The Diamond Match Company of Delaware, a large owner of Michigan real estate, applied for a writ of mandamus to compel Powers, Register of Deeds of Ontonagon County, Michigan, to permit it to have access to his office for the purpose of making a complete abstract of all titles to real estate in the county. *Held*, unless the State of Delaware, to which the company owed its existence and within whose dominion it belonged, had legally empowered it to deal in land and land titles, it could not engage in such affairs in Michigan. For the purpose of exercising any business activities in Michigan, it must rely on the comity of that state, and not on any inherent and absolute right, because it had none. And the state, in

extending its comity, need go no further than its pleasure dictates. It may stop short and recognize but a part of the corporation's powers, or a limited rather than a full exercise of them. But it will never concede permission to go beyond the charter. The authority given to the company by the state which created it was not disclosed and could not be assumed, and hence the writ of mandamus was not allowed.

466. A corporation created under the laws of one state may acquire and hold real property in another state, provided, (1) it has the power to acquire and hold land in the state of its domicile, and (2) the holding and acquisition of land by foreign corporations is not contrary to the statutory law or public policy of the other state. The power of a foreign corporation in this respect will generally be taken for granted and can usually be questioned only in a direct proceeding by the state for that purpose. If the foreign corporation lacks the power, its title is not void but only voidable, and unless the state proceeds to escheat or forfeit the lands, the corporation's power and title should remain unchallenged.

OMNIUM INVESTMENT CO. v. NORTH AMERICAN TRUST CO., 65 Kans. 50 (1902). An agent of the Omnium Investment Company of England wrongfully took title to land as trustee for it and then conveyed the land without consideration to the trust company, which had notice of the facts. In a suit to compel a conveyance by the trust company to the investment company, the defense was that as the latter corporation lacked power to acquire and hold realty in Kansas, its want of authority could be questioned by a private party whom it sued. *Held*, the trust company could not urge the investment company's inability as a defense. The state alone could question the investment company's title and proceed to forfeit the lands, if it so desired.

467. The power of a foreign corporation to acquire lands by devise is generally implied in the absence of express prohibition. And its power to acquire and hold real

estate generally includes also the power to mortgage it. It may also take a lease, license, or mortgage. But merely because it has the power of eminent domain in the state of its creation, a corporation will not have this power in another state unless it is expressly conferred by the latter state. Usually foreign corporations may freely sell or mortgage their lands and acquire, hold, and sell personal property, subject to the limitations of their charter or governing statute and to the laws of the state which they have entered.

LEASURE v. UNION MUTUAL LIFE INSURANCE Co., 91 Pa. 491 (1879). The Union Mutual Life Insurance Company of Maine sued to enforce payment of a loan secured by a mortgage of Leasure's real estate, situate in Pennsylvania. *Held*, a foreign corporation may contract with a citizen of Pennsylvania and sue in the state courts to enforce the contract. Even if the corporation should bring ejectment to recover possession of the land or purchase it at a sheriff's sale, the company's title would be good except as against the Commonwealth. The grantor or mortgagor could not set up the company's lack of power to acquire lands by deed or mortgage as a defense against his own conveyance or mortgage.

QUESTIONS

1. What is a foreign corporation?
2. Why has a corporation no legal existence out of the state which chartered it?
3. The Pennington Oil Company was chartered under New Jersey laws. Desiring to do business in Missouri, it tendered to the Missouri Secretary of State the certificate and fee required of foreign corporations by the laws of that state. But the state declined to allow the oil company to do business in Missouri. The oil company then sued to force the State of Missouri to let it do business there. Will it succeed in this suit?
4. May citizens of Pennsylvania charter a company in New Jersey for the purpose of carrying on their business in Pennsylvania?

5. What are foreign corporations usually required to do before transacting business in a state?

6. The Chicago Beef Company, a corporation chartered in Illinois, rented a storehouse in Philadelphia where its beef was stored before being sent to England. It insured its stock in the storehouse in the Royal Insurance Company, a Pennsylvania corporation. A fire occurred and the beef company sued to recover the amount of the insurance. The defense of the insurance company was that the Chicago Beef Company was a foreign corporation doing business in Pennsylvania without a license. Is this a good defense?

7. Is a foreign corporation a citizen within the meaning of the constitutional provision that "no state shall deny to any person within its jurisdiction the equal protection of the laws"?

8. On what two points does the power of a foreign corporation to hold land depend?

9. Who may question a foreign corporation's power to hold lands?

10. Does a foreign corporation whose charter gives it the right of eminent domain have that power in another than its home state?

CHAPTER XXVIII

OBLIGATIONS OF FOREIGN CORPORATIONS

468. A state has power to exclude a foreign corporation entirely from its borders, or it may admit the company to do business therein on whatever terms and conditions it deems fit to impose. See Section 458. These terms and conditions may be reasonable or unreasonable; but the state is the sole judge of what they shall be, provided, of course, they do not contravene any provision of the state or the Federal Constitution. A foreign corporation entering a state should take care to comply strictly with the local requirements. Otherwise, its officers and agents may subject themselves to fines and penalties, and the aid of the courts will be denied to the corporation itself.

469. One of the usual conditions imposed upon foreign corporations employing capital or doing business within a state is the payment of a license tax or fee. This is required in Alabama, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. In many of these states, however, certain kinds of companies, such as banking corporations, railroad, telegraph, and telephone companies and certain other semi-public corporations, fraternal insurance companies and building and loan as-

sociations, or some of them, are exempted from the payment of this license tax.

470. In many jurisdictions a corporation, before doing business within a foreign state, is required to file an authenticated copy of its charter with the Secretary of State or other designated official. This is the rule in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Porto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

471. Other provisions frequently met with require the taking out of a certificate, license, or permit; or the filing of statements showing the company's financial condition, including its capital and indebtedness; or the deposit of securities of a specified value with a designated state official in the case of insurance companies, investment companies, and certain other corporations. Some states require foreign corporations before doing business therein to have a certain percentage of their capital paid up in cash. Others prohibit the removal of causes in which the corporation is a party to the Federal courts. In other states it is provided that no foreign corporation shall be admitted to do business therein on more favorable terms and conditions than those prescribed for domestic corporations.

LIST v. COMMONWEALTH, 118 Pa. 322 (1888). List, an inspector of the Mutual Fire Insurance Company of Baltimore, Maryland, was found guilty of having unlawfully transacted business in Pennsylvania without having first obtained a certificate of authority so to act from the local insurance commissioner. He was sentenced to pay a fine of \$500. On appeal, *held*, the legislature may prescribe

the conditions under which a foreign corporation shall transact business in the state and the manner in which its agents shall be qualified before entering on their duties. List was an agent of his company and took action relating to risks. By so doing he rendered himself subject to the penalties of the law.

472. No general rule can be laid down as to the effect of a foreign corporation's failure to comply with the laws of the state which it enters, upon its contracts with citizens of that state. Many states hold such contracts utterly void, and the local courts will therefore not lend their aid to an offending company for the enforcement of them. In Illinois, Michigan, Missouri, Rhode Island, and Wisconsin, all contracts of foreign corporations made in violation of local statutes are expressly declared void.

473. In addition to stamping such contracts illegal and void, the laws of some states impose heavy fines and penalties on the offending companies. Thus, the courts of Alabama, Illinois, Indiana, New York, Pennsylvania, Tennessee, and Wisconsin have denied to delinquent foreign corporations the right to enforce their contracts in the courts, although such concerns are also liable to special penalties.

CASSADY v. THE AMERICAN INSURANCE Co., 72 Ind. 95 (1880). The American Insurance Company sued Cassady in Indiana on a promissory note, the sole consideration for which was an insurance contract. The company was chartered in Illinois, but had not obtained a certificate of authority from the auditor of Indiana, as required by law. *Held*, the insurance contract was illegal. The consideration of the note being illegal, payment of it could not be enforced by law.

474. When a statute prohibits or attaches a penalty to the doing of an act, the act is void, nor will the law assist one to recover money or property which he has expended in the execution of it. The imposition of a penalty for the doing of an act implies a prohibition of it, although it is

not expressly forbidden, and the prohibition makes the act illegal and void. But this rule is subject to certain exceptions, some states holding that when a corporation is penalized for transacting business without complying with the local requirements, it does not necessarily follow that the corporation's contracts are unenforceable.

475. Some states, such as Massachusetts and Rhode Island, while imposing heavy penalties upon offending foreign corporations, expressly direct that failure to comply with the statute shall not affect the validity of any contract made by such corporation. In other states, where a penalty is attached to the violation of a statute requiring foreign corporations before doing business therein to file copies of their charters and to appoint an agent, etc., but there is no provision expressly invalidating the contracts of delinquent companies, it is held that the foreign corporation's contracts are not necessarily rendered unenforceable by its want of compliance with the statute.

476. Substantially this view of the law obtains in Arkansas, Colorado, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Washington, and West Virginia.

FIRE ENGINE COMPANY v. TOWN OF MOUNT VERNON, 9 Wash. 142 (1894). The LaFrance Fire Engine Company, a New York corporation, sued the town of Mount Vernon to recover on a promissory note for \$1,250, this being the balance due for a fire engine. The defense was that the engine company had no legal capacity to sue since it had not filed a copy of its charter and other papers with a state officer as required by law. *Held*, the statute having imposed a penalty for the failure of the corporation to comply with the statutory requirements, the additional penalty of inability to enforce its contracts ought not to be implied.

477. Some states hold that the failure of a foreign corporation to comply with the terms and conditions imposed

does not render its contracts wholly nugatory, but merely operates to suspend the company's right to sue on them until it shall have complied therewith.

BUFFALO ZINC & COPPER CO. v. CRUMP, 70 Ark. 525 (1902). This suit involved the validity of certain mining claims. The question of the Buffalo Company's right to sue arose. *Held*, the act of February 16, 1899, provides that every foreign corporation, before it shall do business in Arkansas, must file a certificate designating an agent upon whom service of legal process may be had, and that a corporation failing to comply with the act shall not maintain any suit. Nevertheless, a foreign corporation which complied with the act after it had commenced a lawsuit was entitled thereafter to maintain its suit and prosecute it to final judgment.

478. Another common provision is that every foreign corporation shall designate an officer or agent within the state upon whom legal process against the corporation may be served, or that it shall authorize service of process to be made upon any of its officers or agents within the state engaged in the transaction of its business therein. Requirements of this character are found in Alabama, Arkansas, California, Colorado, Georgia, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Missouri, Montana, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and certain other states. In many of these states some kinds of corporations, such as insurance companies, are required to agree that service of process valid as against the defendant companies may be made upon a designated state officer such as the Commissioner of Insurance or the Secretary of State.

479. Other provisions less frequently met with than the foregoing require that a foreign corporation shall maintain one or more known places of business within the state, and that agents of foreign corporations shall file written evidence of authority with a county officer in each county where they do business.

D. S. MORGAN & Co. v. WHITE, 101 Ind. 413 (1884). In a suit by D. S. Morgan and Company against White for breach of contract, White's defense was that Milligan, D. S. Morgan and Company's agent, who had authorized White to sell D. S. Morgan and Company's goods in Belton County, Indiana, had never filed with the county clerk his written evidence of authority as required by law. *Held*, no purpose would be served by requiring a nonresident manager of a foreign corporation, who comes into the state for the purpose of appointing agents here and there, to file evidence of his authority in each county where an agent is appointed. The statute did not therefore apply. White lost.

480. In Illinois, Minnesota, New York, Pennsylvania, Rhode Island, and Texas compliance with the conditions imposed by the state for the admission of a foreign corporation has been held to be a necessary preliminary to the corporation's bringing suit to enforce its contracts in the courts of these states. And compliance with the statutory requirements after the making of the contract, but before the institution of suit thereon, is seldom sufficient.

WELSBACH COMPANY v. NORWICH GAS Co., 96 N. Y. App. Div. 52 (1904). The Welsbach Company sued the Norwich Gas and Electric Company for goods sold and delivered. The defense was that the Welsbach Company was a foreign corporation which had not procured from the Secretary of State a certificate showing its compliance with all the local requirements, before making the contract sued on. *Held*, the maintenance of any action in this state is absolutely forbidden unless the corporation shall have procured the requisite certificate previously to making the contract in suit. There being no proof that the Welsbach Company had procured the required certificate, it failed to recover.

481. Where a foreign corporation enters a state and makes a contract therein without having complied with the laws respecting such companies, it cannot usually set up its noncompliance with the statute as a defense to an action

on the contract. This holds true even though the statute directs that all contracts made by delinquent corporations shall be void and provides fines and penalties for disobedience. If an offending corporation were allowed to set up its own neglect as a defense, the statute would fail in its object of protecting the citizens of the state in their dealings with foreign corporations, and the result would be that the company would profit by its own delinquency.

WATERTOWN FIRE INSURANCE Co. v. SIMONS, 96 Pa. 520 (1880). In an action by Simons on a policy of insurance issued by the Watertown Fire Insurance Company of New York, the defense was the failure of the company and its agents to observe the Pennsylvania laws respecting foreign insurance companies. *Held*, one of the objects of the statute is the protection of the people against worthless foreign corporations and there is no reason why a solvent foreign company, which has violated the laws of the state in making a contract and receiving insurance premiums from an innocent citizen, should escape liability for nonperformance by setting up its own turpitude. Such a defense has no merit.

482. In many states, failure to observe the law may result in the infliction of a heavy fine on the corporation or subject its agents to fine or imprisonment or both. Therefore the officers and agents of a corporation about to enter a state other than that of its origin for the transaction of business should be especially careful to comply with the state's laws in all particulars.

483. In Appendix B, at the end of this volume, will be found detailed information about the laws of the various states regarding foreign corporations.

QUESTIONS

1. Is a foreign corporation required to pay a license fee in your state? Must it file a certified copy of its charter?
2. What is the effect on contracts with a foreign corporation if it has not complied with the provisions of the statutes respecting

foreign corporations in the state where the contract is made and is to be performed?

3. Is the penalty of inability to sue in the courts of the state imposed on foreign corporations doing business in your state without a license?

4. Name some other provisions usually to be complied with before a foreign corporation can begin business.

5. The General Bridge Company, a corporation chartered in New Jersey, was engaged in building a large bridge in Pennsylvania. Before the bridge was entirely completed, a dispute arose as to the terms of the contract which could not be settled without a lawsuit. Then the General Bridge Company complied with all the regulations regarding foreign corporations doing business in Pennsylvania and brought suit against the other party to its contract for the erection of the bridge. The defendant set up as a defense the fact that the bridge company had not complied with the local regulations before making the contract. Is this defense a good one?

6. The law of Illinois makes all contracts of foreign corporations, which are unlawfully doing business within the state, with citizens of Illinois, unenforceable. The Youngstown Wholesale Grocery Company, a foreign corporation which had not complied with the Illinois statute regulating such corporations, contracted with Peacock, a Chicago grocer, to sell him sixty barrels of sugar. The wholesale grocery company did not perform its contract and Peacock sued for damages. The Youngstown Wholesale Grocery Company pleaded the foregoing statute in defense. Which side wins?

7. Are penalties ever inflicted on the officers and agents of foreign corporations unlawfully doing business within a state, as well as on the corporation itself?

PART NINE

SEMI-PUBLIC, PUBLIC, AND QUASI
CORPORATIONS

CHAPTER XXIX

SEMI-PUBLIC CORPORATIONS

484. Semi-public corporations are essentially private concerns. But as they operate under municipal or other public franchises or perform public functions, they are charged with peculiar duties toward the public. This is especially clear when they are vested with the sovereign power of eminent domain.

485. They are private in that they are organized for the profit of their members and are managed and governed, in the same way as other private corporations, by the stockholders through their authorized representatives, the directors, and have the same powers, privileges, and incidents as other private corporations. They are public, however, in that they make a profit through the transaction of business of a public nature by supplying public wants and furnishing public utilities. In a limited degree the power of eminent domain is often granted to them, and they are under the duty of serving alike all who choose to employ them, within the bounds of their facilities.

486. They have been held to include, among other companies, the following: bridge companies, canal, railroad, street railway, and navigation companies; elevator companies; gas and electric light and power companies; ferry companies; telegraph and telephone companies; and turnpike companies.

(A) Rights and powers of semi-public corporations

487. Semi-public corporations have the same implied powers as other private corporations. See Section 63. They

are therefore endowed with the power of continuous succession, of having a common seal by which to express their assent to contracts, of suing and being sued, and of acquiring, holding, and in many cases of alienating and encumbering their real and personal property.

488. They distribute their profits in the shape of dividends among their members. In many states, they may be dissolved in the same way as other private corporations, and upon such dissolution their assets are applied, first, to the payment of the corporation's liabilities, and the remainder is distributed among the stockholders in proportion to the number of shares held by each. See Chapter XXI.

489. Semi-public corporations are regarded as public corporations in so far as they serve and benefit the public by supplying it with public utilities. Many of them are therefore invested with the power of eminent domain. A company so empowered may take private property for its own use where the public in general will be benefited thereby. This power is of great importance to canal and railroad companies, for without it a single landowner might block a line of transportation, and force a company to pay almost any sum for his land.

490. Where the property of individuals is taken by railroad companies or other semi-public corporations, it is, on account of the public benefits resulting therefrom, deemed to be taken for a public use. Of course, even the legislature, in the exercise of its power of eminent domain, could not appropriate the property of individuals to a mere private enterprise in which the public have manifestly no interest.

491. Where the power of eminent domain has been delegated to a semi-public corporation, that power must be strictly pursued. Therefore, in the appropriation of private property to a public use, a corporation must follow

closely the path marked out for it by the legislature. It can do no more than the legislature has sanctioned.

492. Private property must not be taken or directly damaged for public use, even by the state, without making just compensation to the owner. The same principle applies to semi-public corporations, when the right of eminent domain has been delegated to them. Therefore private property cannot be taken by any semi-public corporation until just compensation shall have been paid or secured to the owner. The manner in which this compensation shall be ascertained when private property is taken or damaged for public use by semi-public corporations has been prescribed by the general laws of almost every state.

493. The public uses for which private property may be taken or damaged have been held to include the following: (1) The construction of railroads, canals, turnpikes and roads, public landings, bridges, public streets, alleys, and all other improvements for public use. (2) For courthouses, schoolhouses, and other public buildings for the use of a county or a municipal corporation. See Chapter XXX. (3) For public cemeteries. (4) For companies organized for the purpose of transporting oil or natural gas by means of pipes or otherwise when for the use of the public. (5) For telegraph and telephone companies when for public use. (6) By the Federal Government for the purpose of erecting thereon lighthouses, signal stations, beacons, locks, dams, works for improving navigation, post offices, custom-houses, courthouses, or any other needed public construction or work of public improvement.

(B) Liabilities of semi-public corporations

494. Most semi-public corporations have in view some great enterprise in which the public interests are involved. Accordingly, they are subject in a high degree to public

regulation and control. It is a general principle of law that under the police power a state may regulate the conduct of its citizens toward one another, and the manner in which each shall use his own property, when such regulations become necessary for the common good. The state's power to regulate and control is even more apparent in the case of semi-public corporations which have received public powers and which undertake to devote their property to public uses.

495. The maxim of the law, that when private property has been affected with a public use it ceases to be private property merely, enunciates the principle upon which the state's right of regulation and control rests. The property of semi-public corporations is clothed with a public interest, used, as it is, in a measure to affect the community at large.

496. In the exercise of its police power the state may regulate public bakers, common carriers, ferrymen, hackmen, innkeepers, millers, wharfingers, electric light and power companies, telegraph and telephone companies, pipe lines, grain elevator and irrigation companies, and many others.

497. Semi-public corporations exercise their powers and privileges subject to the government's right to make such reasonable regulations as will preserve and protect the lives, the health, and the property of its citizens. These regulations may embrace a number of objects of which no detailed enumeration is here possible. But in the case of a railroad company, for example, the state may provide for supervising its track, attending switches, using proper rails, fixing the number of brakemen on a train in proportion to the number of cars, employing competent and temperate engineers, running within a given rate of speed, coming to a full stop before crossing bridges, and many other matters proper for the state's regulation.

THORP v. RAILROAD Co., 27 Vt. 140 (1855). Thorp sued the Rutland and Burlington Railroad Company to recover damages for sheep killed by a locomotive. The sheep had strayed upon the defendant's track, there being no cattle guard between the railroad line and Thorp's land. A question arose as to whether or not the defendant was bound by a provision in the General Railroad Act of 1849, requiring railroads to construct and maintain cattle guards. No such obligation had been imposed by the company's charter granted in 1843. *Held*, the police power of a state extends to the control of the railroad business so as to prevent needless injury to persons or property. The state therefore may require existing railroad corporations, and all hereafter incorporated, to maintain cattle guards at crossings, or to pay damages for all cattle injured by their trains through such omission.

498. The state's control over semi-public corporations is usually exercised in the first instance by the legislature, or the state may exercise a vicarious control by delegating some part of its powers to public corporations. See Chapter XXX. Subject to the limitation that the laws enacted by the legislature for the control of semi-public corporations shall be reasonable and shall not contravene any provision of the state or the Federal Constitution, the legislature may pass whatever laws will in its judgment be appropriate for protecting the property, the health and the safety of the public, and also for promoting the interests of the people in so far as they have to deal with semi-public corporations.

499. The legislature cannot, by contract, divest itself of the power to provide for any of the things just mentioned. They belong to that class of objects which demand the application of the maxim, "the public welfare is the supreme law"; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bartered away than the power itself.

500. When a legislature in exercising its right to control semi-public corporations fixes the charges to be paid them for services, it must take care that the charges so fixed are reasonable. On the general subject of railroad-rate regulation the following propositions have been established, and they illustrate the principles applicable to semi-public corporations in general.

501. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. A state law, or regulations made under authority of a state law, establishing rates for the transportation of persons or property, that will not admit of a railroad company's earning such compensation as, under all the circumstances, is just to it, deprives it of its property without due process of law and denies it the equal protection of the laws. Such laws or regulations are therefore unenforceable as being repugnant to the Fourteenth Amendment of the United States Constitution.

502. While rates for the transportation of persons and property within the limits of a state are primarily for legislative determination, the question whether or not they are so unreasonably low as to deprive the carrier of its property without just compensation, cannot be conclusively determined by the state legislature or by regulations adopted under its authority. The matter may become the subject of judicial inquiry. A railroad company is entitled to ask a fair return upon the value of that which it employs for public convenience. On the other hand, the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by it are usually worth.

WILCOX v. CONSOLIDATED GAS CO., 212 U. S. 19 (1909). The New York State Legislature, by a law passed in 1906, limited the

price to be charged for gas to eighty cents per 1,000 cubic feet. The Consolidated Gas Company asked that the Public Service Commission be restrained from carrying out this law. *Held*, the rate fixed was reasonable. Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used. Six per cent is a fair return on the value of property employed in supplying gas in the city of New York, and a rate yielding that return is not confiscatory. In the absence of proof that the eighty cent gas rate would yield the company a less return than six per cent on its investment, the Public Service Commission would not be restrained from enforcing the law.

PENNSYLVANIA R. R. Co. *v.* PHILADELPHIA COUNTY, 220 Pa. 100 (1908). The Pennsylvania Legislature passed a statute fixing a maximum passenger rate of two cents per mile, and imposing heavy penalties for any overcharge. The Pennsylvania Railroad Company sought an injunction to restrain the county of Philadelphia from the collection of such penalties. It was proved that were the statute to be enforced, the company would derive less than a six per cent yearly profit from its passenger business. *Held*, in Pennsylvania six per cent is the legal estimate of the legitimate profit from the ordinary safe use of money. What is a fair profit is a complicated and difficult question, but there are certain elements that are plainly to be regarded to avoid injustice, such as the original investment, the risks assumed when the business was undertaken, the returns as compared with those of other similar enterprises, the cost of maintenance and improvement, the prospects of increase, and the present value in view of the elements just mentioned. Injustice is done by anything that fails to consider these and to deal equitably with the private as well as the public interests involved. It is not necessarily regulated by what others would now make the venture for, under present circumstances and with present knowledge. The public having long reaped the incidental profits from the development of the country by the enterprise and venture of the railroad company's capital, in the increased value of land, the opening of new and wider markets for crops and manufactures, and the facility of intercourse and exchange for persons and property, the courts should not now ignore this aspect of the subject in con-

sidering the matter of injustice to the corporation. The injunction was granted. The statute was declared inoperative as to the Pennsylvania Railroad Company, although even were the two cent rate to be enforced, the company might have made six per cent on its total investment, considering both the freight and the passenger ends of its business. The fact that it might have made up on its freight traffic the loss suffered through its passenger traffic had no weight. Each branch of the service ought to be separately considered. A public service company should not ordinarily be required to do any part of its business at a loss, merely because such loss can be offset by the profit on another branch. To concede that principle would permit the legislature to compel the carriage of passengers for practically nothing, though the result would be that freight must pay high rates so that passenger travel might be cheap.

QUESTIONS

1. What is a semi-public corporation? Give examples.
2. What is the difference between semi-public and private corporations?
3. The Kingston Railroad Company had been granted the power of eminent domain. In payment of a debt due it, the railroad had taken title to a powder mill near its tracks and proceeded to operate it for the manufacture of powder. It wished to extend its powder plant, so when it was unable to agree with the owner of adjoining land on the price to be paid for his property, the railroad sought under its power of eminent domain to be allowed to take the land on its paying a reasonable compensation therefor. Will the railroad succeed in its suit?
4. Name some purposes for which land may be taken under eminent domain proceedings.
5. What is meant by the "police power" of a state?
6. Why should semi-public corporations be subject to a higher degree of public regulation than private corporations?
7. What limits are placed on the right of the legislatures of the several states to regulate semi-public corporations?
8. The charter of the Woonsocket Railroad Company provided that the corporation should not be subject in any manner to legis-

lative control of its rates, the number of trains or any other part of its business. About ten years after the state had granted this charter, the legislature passed a two cent rate bill. The Woonsocket Railroad Company resisted the enforcement of this law, as applied to it, on the ground that it was a breach of the contract between the state and the corporation as embodied in the corporate charter. Which side wins?

9. Why may not a legislature fix the rates of a railroad company unreasonably low?

10. Is the question as to whether rates are reasonable or not to be determined by the legislative or the judicial branch of government?

CHAPTER XXX

PUBLIC CORPORATIONS

503. The most fundamental division of corporations is into two great classes, namely, private and public corporations. Private corporations, which we have been heretofore discussing, are in most instances formed primarily for purposes of pecuniary gain. Public corporations are formed for public purposes. Some private corporations, such as public service companies operating under municipal franchises or being invested with duties of a public nature and having certain public rights, such as the power of eminent domain, are frequently called public corporations. They are public, however, only in so far as they exercise public rights and serve to benefit the public by the supply of public utilities. See Chapter XXIX.

504. A public corporation has been defined as a "corporation created by the state for public purposes only as an instrumentality to increase the efficiency of government, supply the public wants, and promote the public welfare." Public corporations are, therefore, those corporations which are created by the sovereign power of the state through its legislative branch, whereby the people of a certain prescribed area within the state are constituted a body politic and corporate for purposes of local and self-government, and invested with powers of a public governmental character and other powers of a private corporate character.

505. Municipal corporations, boroughs, towns, and vil-

lages, incorporated under a special legislative act or pursuant to the general legislation of a state, are among the best-known types of public corporations. But it must be remembered that many boroughs, towns, and villages have never been chartered and are not corporations. Counties, townships, and other unincorporated districts are sometimes known as public corporations, although a better designation of them is quasi corporations. See Chapter XXXI. The governments of the United States and of the several states of the Union are not public corporations.

(A) Creation, alteration, and dissolution of public corporations

506. Public corporations may be created either by the United States Congress, by the state legislatures, or by the territorial legislatures when authorized by Congress. The power to create public corporations for all municipal purposes and to invest them with the means of self-rule is an attribute of sovereignty which is exercised through the legislative branch of government. Public corporations are therefore subordinate divisions of the state government which the legislature may create, abolish, or alter at will without the consent of the inhabitants of the incorporated territory, subject only to that clause of the Federal Constitution which forbids a state to pass any law impairing the obligation of a contract. If a public corporation binds itself by contract, the state cannot, by subsequent legislation, destroy the vested rights of those dealing with the corporation.

507. A public corporation is merely an agency created by the state for the purpose of carrying out in detail the objects of government. Its charter is not a contract with the state and the corporation has no vested right to any of its powers or franchises or even to the continuation of its existence. The corporation is fully subject to the control

of the legislature, which may at its pleasure narrow or widen its territorial extent or its powers, split it into two or more corporations, combine two or more into one, or alter or annul the charter. Thus the state can even destroy the very existence of a public corporation at its arbitrary discretion.

508. While they exist in subjection to the will of the legislature, public corporations enjoy certain of the rights and are subject to certain of the liabilities of other corporations. They may, therefore, as a rule, sue and be sued, acquire, hold, and alienate property, make contracts and use a corporate seal. Yet the possession of these rights does not in any way change or diminish the state's plenary power over them.

BLANCHARD *v.* BISSELL, 11 Ohio 96 (1860). Bissell sought to enjoin Blanchard, City Treasurer of Toledo, from collecting taxes levied on some town lots and lands owned by Bissell and forming part of certain territory which had been annexed to the city of Toledo. Before the annexation, it had adjoined the city as originally laid out. *Held*, (1) such annexation might be ordered without the consent and against the remonstrance of the persons residing in the annexed territory. (2) Lands thus annexed are liable to local taxation on account of preëxisting city debts.

LUEHRMAN *v.* TAXING DIST., 2 Lea (Tenn.) 425 (1879). The legislature of Tennessee repealed the charter of the city of Memphis and instituted taxing districts in place of the former city government. From a tax assessed by the state under the new law, Luehrman and others appealed, arguing among other things that the statute repealing the charter of Memphis was unconstitutional. *Held*, municipal corporations are within the absolute control of the legislature, and may be abolished at any time in its discretion.

509. The creation of a public corporation is frequently evidenced by a document known as a municipal charter. This ordinarily establishes the frame of government and prescribes the rights, duties, powers, and obligations of the

corporation. The legislature in the exercise of its discretion to create public corporations usually does so either (1) by means of a special legislative act; or (2) in accordance with the terms of general statutes providing a mode for the organization of municipal corporations when the people of a certain territory shall have expressed in a prescribed way their desire to erect and form a municipal corporation.

510. In Arkansas, California, Illinois, Indiana, Iowa, Kansas, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia the creation of corporations by special legislative act is forbidden. In these, and many other states, incorporation practically always takes place under general statutes.

511. Where public corporations are created under the general legislation of the state, substantial compliance with the terms thereof is ordinarily all that is required. Usually the procedure is about as follows: Whenever the people within a certain prescribed area desire to become a public corporation, the required number of citizens must file in a designated state office a petition setting forth their desire. An election is then held, and if a majority of the voters cast their votes in favor of the incorporation, the public corporation is finally called into being by means of a second election. This is for the choice of officers to manage and control the corporation, which is thus invested with all the rights, powers, duties, privileges, and franchises conferred upon public corporations by the legislation of the state. Usually the organization takes place under the supervision of a court, board, or officers specially designated for the purpose, and the instrument showing the result of the election and setting forth the powers, duties, and franchises of the corporation, and known as the corporate charter, is filed in a designated county office.

(B) Powers of public corporations

512. A public corporation possesses only those powers which are expressly conferred upon it by the state, or which are necessary or proper for the exercise of those expressly conferred, or which are inherent in every public corporation. Its powers are therefore (1) express, (2) implied, (3) inherent or indispensable.

513. Express powers are those conferred by the special legislative act or the general legislation under which a corporation has been organized. They differ with the special needs and circumstances of each corporation, and no detailed enumeration of them is here possible. Usually executive, legislative, and judicial powers, corresponding to the three coördinate branches of our state and national governments, are conferred upon public corporations.

514. Implied powers are those which, without being expressly conferred upon a corporation or indispensable to its existence, are nevertheless necessary or appropriate to the proper exercise of the corporation's express powers. Thus public corporations have been held to possess implied power to acquire, hold, and sell real and personal property for proper corporate purposes, to take and hold property in trust for public charitable uses, to make contracts, issue evidences of indebtedness, etc.

515. Inherent powers are those which are incidental or indispensable to the existence of a corporation, and which are known as the "common law" powers of a corporation, namely: (1) to have continuous succession; (2) to sue and to be sued, to grant and to receive by its corporate name in the same manner as natural persons; (3) to have a common seal; (4) to make by-laws for its internal government. See Section 62.

516. The powers of a municipal corporation are sometimes classified as follows: (1) Public or governmental

powers, such as are granted and conferred upon it as a local agency with fixed and limited authority to be exercised by it in administering the affairs of the state and promoting the public welfare within its borders. (2) Private corporate powers which are those granted and conferred for the special benefit and advantage of the community which is made a public corporation.

517. The principles governing the private powers of public corporations are substantially the same as those prevailing in the case of private corporations, and will not be given detailed treatment here. See Chapter VI. The public governmental powers of public corporations will be discussed briefly under the following heads: (1) eminent domain; (2) public improvements; (3) police power; (4) taxation.

1.—EMINENT DOMAIN

518. Eminent domain is an attribute of sovereignty entitling the state or sovereign to take private property for public use upon making just compensation therefor. This attribute of sovereignty the state may delegate, and the power of eminent domain is therefore frequently found among the express powers of public corporations. But the power is hardly ever implied in the case of a public corporation if there has been no express grant. A familiar instance of the exercise of the power of eminent domain by public corporations is the appropriation of land for the building of highways, or of securing or conveying to a city a supply of water, or of laying out a public park or square and other kindred purposes.

2.—PUBLIC IMPROVEMENTS

519. The power to make public improvements is usually expressly conferred upon public corporations. Where not so conferred, the power to make such improvements

as are necessary and proper for carrying out the corporate purposes will be held to be inherent in the corporation. In the exercise of its power to make public improvements, a municipal corporation may therefore construct and maintain street; lay, pave, and repair sidewalks; furnish an adequate water supply; provide for lighting the city, and construct public buildings.

THE MAYOR, ETC., OF CARTERSVILLE *v.* BAKER, 73 Ga. 686 (1884). Baker filed a bill in equity to prevent the city of Cartersville from erecting a schoolhouse on a lot belonging to the city, which had been dedicated to it for school purposes, out of the funds in its treasury. *Held*, unless there was something in the charter forbidding the erection of schools, the city might build one even without express authority. This is within the scope of a municipal corporation's general powers.

520. Its charter, or the general legislation of the state, usually confers upon a public corporation the right to open and construct streets, although the right to condemn land for the purpose does not follow from the power to open streets. The power to repair and improve streets and change the grade thereof generally follows from the power to open and construct them. The state legislature alone has power to vacate streets, although this power is frequently delegated.

521. Among the implied powers of public corporations with respect to public improvements are the power to provide an adequate water supply, including the building and operating of waterworks, and the power to provide for the lighting of the public streets, including in some cases the erection of a lighting plant. Express legislative authority is usually required by public corporations for the construction of a sewerage system; or the building of subways, wharves, or docks; or the establishment of markets, or the acquisition of land for public parks or squares.

3.—POLICE POWER

522. The police power of a state has been defined as "the power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." This power is the supreme attribute of sovereignty, and as it is essential to public corporations, is usually expressly conferred upon them. When not so conferred, it will be held to be among their implied or inherent powers. The power granted to the corporation must be exercised by it for the public welfare, and cannot be waived or delegated.

523. Under the police power conferred upon a municipal corporation, it is sometimes authorized to legislate upon subjects which have been already included in the general legislation of the state. Such double legislation is not necessarily void, but when the ordinance of a public corporation conflicts with the state regulation on the subject, the ordinance will usually be declared void, especially if it provides for a lesser penalty or license fee or imposes conditions other than those prescribed in the general legislation of the state.

524. Proper objects for the exercise of the police power of a municipality include the following: public health and comfort, markets, occupations and amusements, peace and order, public safety and sanitation. Whatever injuriously affects the public health, convenience, or morality is a legitimate object for the exercise of the police power. It has therefore been held that a public corporation may prohibit and penalize the carrying of concealed weapons, cruelty to animals, desecration of the Sabbath, public drunkenness or profanity, and the running of animals at large.

525. The necessity of a public market, where producers and consumers of fresh provisions can be brought together for the purchase and sale of commodities, is apparent. The state usually confers upon public corporations the power to establish public markets. The power to establish public markets will be implied in the absence of an express restriction, the general rule being that every public corporation which has power to make by-laws and ordinances to promote the general welfare and preserve the peace of a city or town, may fix the times and places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the common good.

WARTMAN v. CITY OF PHILADELPHIA, 33 Pa. 202 (1859). Wartman, the lessee of a stall in the High Street market sheds of Philadelphia, filed a bill in equity to enjoin the city from removing the market sheds from High Street and establishing public markets in four other places in the city. *Held*, the right to establish a market includes the right to shift it from place to place, when the convenience or necessities of the people demand it. It would be fastening a strange imbecility on the government of an American city, to decide that it shall not have new market houses, whatever may be the need of the people, without also maintaining the old ones after they become useless.

526. The police power of a public corporation does not confer upon it the right to prohibit an innocent amusement or a useful occupation. But a public corporation has the right by virtue of its police power to make reasonable regulations governing amusements and occupations carried on within its jurisdiction. Accordingly, gambling, lotteries, the keeping of houses of ill fame, and the leasing of properties for such purposes may be entirely prohibited or strictly regulated. A license for the transaction of an ordinary business, however, cannot be required unless this power is expressly conferred on the public corporation by its charter or is necessarily implied therefrom.

527. The police power of a public corporation enables it to make all needful and appropriate regulations for the safety of life and property within its territorial limits. In the charters of many public corporations, after the enumeration of special powers, authority is given to pass all needful ordinances for promoting the public safety and the welfare of the community not inconsistent with the constitution and statutes of the state. Under this "general-welfare" clause the corporation may prohibit or regulate the keeping of disorderly houses, mark out fire limits, and arrange for the organization and maintenance of apparatus for fighting fires, provide against dangerous occupations and the storage of dangerous chemicals, restrict laundries to a certain locality, regulate the speed of vehicles and make other traffic regulations, take appropriate measures to protect life and property in case of riot, regulate the liquor traffic, and look after the maintenance of public markets and the observance of the Sabbath.

4.—TAXATION

528. The power to levy taxes for the support of government is an essential attribute of sovereignty and therefore is not possessed by a public corporation unless delegated to it by the state. But the power to impose and collect taxes for appropriate purposes is nearly always conferred upon public corporations, and may even be implied from the grant of other powers, as, for example, from the power to borrow money.

(C) Liabilities of public corporations

529. Among the private powers of public corporations is their power to sue in the ordinary courts of justice. The converse of this power is the liability of a public

corporation to be sued by the injured party for any wrong it may have done. A public corporation may therefore be made defendant in a contract action or in an action for a civil wrong not arising out of contract. In some cases, where an offense is defined by statute, it may even be subject to criminal prosecution, as, for instance, for not keeping the streets in repair or for obstructing the public highways.

530. In most states public corporations are required by statute to keep their streets, sidewalks, and other public highways open, in repair, and free from obstruction. This duty is mandatory, and a municipal corporation must remove from the public ways any unlawful defects or obstructions within a reasonable time after they are brought to the corporation's notice. A public corporation is therefore liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk, which it permits to remain after reasonable notice of its existence.

531. A public corporation is not ordinarily liable for breach of one of its public governmental duties. However, for breach of its private duties its liability is ordinarily the same as that of a private corporation.

QUILL v. MAYOR, ETC., OF CITY OF NEW YORK (S. C. N. Y. App. Div., Jan. 31, 1899). Quill sued the city to recover for personal injuries alleged to have been inflicted by a garbage cart, belonging to the street cleaning department, as Quill was about to board a street car. *Held*, the injury having resulted from the negligence of the driver, the city was liable, as the duty imposed by law upon the city to remove garbage, etc., from the streets is one laid upon it in its private corporate character, and not in its governmental capacity.

BARTLETT v. CLARKESBURG (S. C. App. W. Va., Nov. 30, 1898). Bartlett sued to recover damages from the town of Clarkesburg for personal injuries sustained by reason of the discharge of fireworks by citizens in the public streets, on the ground that the fireworks were discharged with the knowledge and consent of the mayor, council, police, and other officers of the corporation. *Held*, the injury resulted from the act of the mayor and the other civic authorities

in permitting the discharge of fireworks. But an incorporated town is not liable for damages caused by the wrongful acts or negligence of its officers or agents in matters pertaining to the municipal powers and functions of a public governmental character.

QUESTIONS

1. What is a public corporation? Give an example.
2. By whom may public corporations be created? Is the consent of the people so made a corporation necessary?
3. The cities of Landen and Steenkirk adjoined each other. The state legislature, against the strong protest of the people of both cities, passed an act taking two wards away from Landen and adding them to Steenkirk. Keebler, a citizen of one of the transplanted wards, declined to pay his taxes to the city of Steenkirk and sought to enjoin the tax collector of Steenkirk from selling his property. Will Keebler succeed?
4. Is the creation of corporations by a special act forbidden in your state?
5. Describe the procedure usually followed in forming public corporations.
6. What three kinds of powers have public corporations?
7. Name the "common-law" powers of public corporations. Name their governmental powers.
8. What is meant by the words "eminent domain"?
9. What is the police power of the state?
10. The Borough of Westfield passed an ordinance requiring all trains to run through the borough at a speed of not more than three miles an hour. A train of the Northern Pacific Railroad ran through the place at sixty miles an hour, so the local authorities had the train crew arrested and fined. From the imposition of these fines the defendants appealed, maintaining that the ordinance was void. Which side wins?
11. Has a municipal corporation the right to require a license of all doing business within the city limits as shoemakers?
12. May a public corporation be made defendant in a suit for damages? Distinguish between the private duties of these corporations and their governmental duties. May a corporation be sued for breach of its governmental duties?

CHAPTER XXXI

QUASI CORPORATIONS

532. *Quasi* corporations have been described as agencies of government embracing every local subdivision of a state, other than incorporated villages, towns, and cities, possessed of the powers of local administration, and created by general law to effect the management of public affairs and the enforcement of law. These organizations have been held to include unincorporated boards or councils of public officers, such as a board of education, overseers of the poor, a board of park commissioners, counties, road, and school districts and townships. *Quasi* corporations are usually created by legislative act without the consent of the inhabitants of the territory, who are thereby created a *quasi* corporation, although in some cases local popular assent is required. Like public corporations, *quasi* corporations are fully subject to legislative control, and may be created, or abolished, or have their territorial limits increased or diminished at the will of the legislature.

533. *Quasi* corporations are not, strictly speaking, corporations, because they have not been chartered. They are not public corporations for the additional reason that they usually lack the legislative faculty of regulating their internal affairs. But they can perform many of the functions of real corporations, and hence are known as *quasi* or "as if" corporations. They can sue and be sued, purchase, hold, and alienate lands, appoint agents to execute

their purposes, and evidence their acts by a common seal. The people comprising the membership of a *quasi* corporation legislate for themselves through their representatives in the state legislature.

534. Municipal corporations are the most perfect type of public corporation. They are usually called into being either at the direct request or by the voluntary consent of the people who compose them. See Chapter XXX. A county one of the best-known types of *quasi* corporation, is a local subdivision of the state, created by its sovereign power and without the request, consent, or action of the inhabitants thereof. A municipal corporation is created chiefly for the advantage, convenience, and interests of the citizens thereof. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, education, provision for the poor, military organization, and the administration of justice. All the powers and functions of the county organization have reference to the general policy of the state being used in connection with the general administration of that policy.

535. It is important, therefore, to distinguish between public corporations, such as incorporated cities, and *quasi* corporations, such as counties, unincorporated towns and districts, which are invested by statute with certain powers without their consent. *Quasi* corporations are liable to information or indictment for breach of a public duty imposed on them by law; but they are not liable in a civil action in their corporate capacity for breach of a corporate duty, unless such right of action is expressly conferred by statute.

COMMISSIONERS OF HAMILTON COUNTY *v.* MIGHELS, 7 Ohio 109 (1857). Mighels sued the Commissioners of Hamilton County for damages sustained by reason of their neglect in leaving uncovered

and unprotected a large opening in the floor of the county courthouse. *Held*, the board of commissioners of a county are not liable, in their *quasi* corporate capacity, to pay damages for injury resulting to a private party from their negligence in the discharge of their official functions. One reason for this is that a county seldom has funds out of which satisfaction could be made.

(A) Powers of quasi corporations

536. Under the doctrine of implied powers it has been noted that corporations in general possess in addition to their express powers such other powers as may be necessary to give effect to those expressly granted. See Section 62. But *quasi* corporations possess only some of the implied powers which appertain to perfect corporations. These include continuous succession, a corporate name, and the power to acquire and hold such real and personal property as the purposes of a particular *quasi* corporation may render necessary or proper. In addition, many *quasi* corporations possess to a limited degree, as local subdivisions of the state, certain delegated attributes of the sovereignty of the state, such as the powers of eminent domain, police, and taxation.

537. The power to acquire and hold real estate for proper purposes is usually conferred upon *quasi* corporations. Where the power is not so conferred it will ordinarily be implied. A *quasi* corporation may therefore usually acquire real estate for the purpose of erecting county buildings thereon, such as a courthouse, jail, or poorhouse. The state is usually the only party that can raise the question whether or not the realty has been acquired for authorized uses, although in many cases a taxpayer may bring suit where a county buys land for other than proper purposes or buys more than is reasonably necessary. The properly constituted county authorities may sell and convey real estate owned by the county even

though the original deed whereby title was vested in it specifies that the real estate has been purchased for the purpose of erecting a courthouse and other county buildings thereon.

BOARD OF SUPERVISORS OF WARREN COUNTY *v.* PATTERSON, 56 Ill. 111 (1870). Patterson filed a bill in equity against the Supervisors of Warren County to enjoin them from selling or disposing of certain real estate. He alleged that the realty in question had been purchased as a site for a courthouse and other county buildings. Patterson had contributed \$570 to help pay the purchase price thereof. *Held*, the county was possessed of an absolute estate in fee simple in the land, uncontrolled by any condition, restriction, limitation or reservation whatever. The mere fact that the land had been conveyed "for the purpose of erecting a courthouse and other county buildings," did not limit or restrict in any way the power of alienation by the proper county authorities.

538. Like public corporations, *quasi* corporations usually possess the power of eminent domain in a limited degree. In most cases they may proceed by the proper agencies to condemn private land for the purpose of building a clerk's office, a courthouse, and jail thereon, or of establishing public highways, ferries, or other works of public necessity.

BOARD OF SUPERVISORS OF CULPEPER COUNTY *v.* GORRELLS, 20 Grat. (Va.) 484 (1871). This was a suit in equity against the Board of Supervisors of Culpeper County to enjoin them from condemning certain land under the power of eminent domain for the purpose of erecting a courthouse, a clerk's office and a jail thereon. *Held*, under the power to "build and keep in repair county buildings," the Board of Supervisors are authorized to acquire lands either by purchase or by the exercise of the power of eminent domain.

539. Upon the theory that *quasi* corporations have been legally invested with the express powers essential to their existence and by implication with the varied attributes necessary to the preservation thereof, it has been held that

they are clothed with certain implied police powers. These may be asserted as exigencies demand, for public purposes, within the scope and compass of a *quasi* corporation's organization. The principle upon which a *quasi* corporation exercises its police power is the preservation of the public health and safety. This police power is frequently brought into play in measures directed toward preventing or stamping out infectious diseases.

540. *Quasi* corporations may enter into such contracts through their authorized officers as are within the scope of their lawful powers, or proper for the corporate purposes. One dealing with the officers of a *quasi* corporation, as, for instance, a county, should make sure that the county officers are authorized to contract, for the county will not be liable unless the contract was strictly within the powers conferred upon the officers by the state law.

541. In general, persons dealing with a county should be careful to see (1) that the county is authorized by statute to make the contract in question; (2) if the mode in which the contract is to be executed is prescribed by law, that such mode be strictly followed; (3) if popular assent is required for the making of any contract whereby an indebtedness may be incurred, that such assent be obtained in the manner prescribed by law. Where the mode in which a contract made by a county is not prescribed by law, the rules applicable to public corporations govern.

542. Unlike most corporations, *quasi* corporations have usually no implied power to borrow money. *Quasi* corporations, such as counties and townships, have therefore no power to issue paper obligations of a commercial character, unless specially authorized. Such power is regarded as entirely foreign to the purposes of their creation and is never to be conceded except by express legislation, or by necessary, or at least very strong, implication from such legislation.

CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400 (1883). Brooks, as assignee of the original holder, sued Claiborne County to recover on a negotiable bond issued to V. H. Sturm, in payment for work done in the erection of a county courthouse. Brooks rested his claim to recover on the theory that the county, having power to contract for the erection of a courthouse, had also the incidental power to issue commercial paper in payment. *Held* that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, have no power or authority to issue commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power, expressly given, which cannot be fairly exercised without it. Brooks lost.

543. The statutes of most states confer upon counties the power to issue bonds for certain specified purposes. Counties are therefore usually authorized specifically to issue bonds for the purpose of funding or refunding county indebtedness, or to erect county buildings, or to construct other works of public and internal improvement. Generally, it is further provided what officer or body shall issue the bonds and the manner of their issue. Where such provisions exist they must be strictly followed; otherwise the bonds will be void.

POLLY v. HOPKINS, 74 Tex. 145 (1889). Hopkins, a taxpayer, sued Polly, county judge of Hemphill County, to restrain him from awarding a contract for the erection of a county jail and issuing county bonds in payment therefor. *Held*, the injunction asked for by Hopkins was not necessary. The county commissioners' court being the only body empowered by Texas statutes to authorize contracts for the erection of county buildings, bonds in payment for a county jail, to be constructed under an alleged contract made by a single judge of the commissioners' court, not only without the authority but directly contrary to the resolution of that court, would be utterly void.

544. In many cases counties may be authorized to issue bonds without popular consent. Where the statute does not require it, it is unnecessary to submit the question of issuing the bonds to the people. The requirement that the assent of the qualified electors shall be first obtained is, however, very common, and bonds issued in disregard thereof are void.

STEINES *v.* FRANKLIN COUNTY, 48 Mo. 167 (1871). A Missouri statute provided that "before any expenditures shall be made by the county courts, for the purposes of this act, the county courts may, for the purpose of information, submit the amount of the proposed expenditures to the voters of the respective counties, etc." Under this act the county court of Franklin County proceeded of its own motion, without submitting the question to the voters of the county, to issue county bonds for the building of a county road. In a suit by a bondholder, *held*, when the rights of third persons are involved, or the public good requires it, the word *may*, used in a law, should always be construed to mean *shall*. Therefore, no election having been held, the power to issue the bonds did not exist. The bonds were void, and the creditors could not recover upon them.

545. While not possessed of an inherent power to levy taxes, *quasi* corporations usually have conferred upon them a limited power of taxation for certain appropriate local purposes. Where the power is not expressly conferred it may be implied from the grant of certain other powers, as, for example, the power to erect county buildings and to issue bonds therefor. Here the power of taxation should be implied from the other power, because the revenues provided by the state for the *quasi* corporation would probably be insufficient for such extraordinary expenditures. Taxation would be the only means whereby a revenue might be provided for the payment of interest on the bonds and the establishment of a sinking fund for their ultimate redemption.

546. The power to tax is sometimes limited by the fundamental law of a state, the constitution. Where a tax is imposed in excess of the limit so fixed, it will be void as to that excess. So also, the purposes for which *quasi* corporations may levy taxes are usually specified by the legislature, and a levy of taxes for any other purpose will be void. The question as to what are proper purposes of taxation is often raised in the case of a county. These have been held to include the following: Public improvements in general, such as the erection of county bridges and public buildings; the payment of appropriations in aid of education throughout the county, or, in certain cases where the law does not especially forbid it, in aid of railroads or other private corporations; the payment of interest on county bonds and the provision of a sinking fund for the redemption thereof.

(B) Liabilities of quasi corporations

547. Persons seeking to enforce any contractual liability against a *quasi* corporation must show that the contract is one which the defendant was authorized to make. But liability may be implied in certain cases though not expressly provided for by authority of law.

IRWIN v. YUBA COUNTY, 119 Cal. 686 (1898). Irwin, chairman of the board of supervisors, sued the county of Yuba to recover compensation for his services and traveling expenses in attending a congress of the state "anti-débris association" as the representative of Yuba County. *Held*, one who demands payment of a claim against a county must show some statute authorizing it, or prove that it arises from some contract, express or implied, which is warranted by law. It is not enough that the services for which payment is claimed were beneficial. Irwin, failing to establish his claim properly, could not recover.

548. A *quasi* corporation, being a local and political subdivision of the state, is not ordinarily liable for civil

wrongs not arising out of contract, unless a right of action against it is expressly conferred by statute. This is for the reason that the state, being sovereign, is immune from suit unless the same is brought with its consent, and a *quasi* corporation as a branch of the state enjoys the same immunity. Under the laws of many states, however, liability is imposed by statute in certain cases.

QUESTIONS

1. What are *quasi* corporations? How are they created?
2. What are the powers of *quasi* corporations?
3. May damages be recovered against a *quasi* corporation for a tort of its officers?
4. The County of Bradford was indicted for failing to keep in repair the county roads. The county contended that a *quasi* corporation could not be guilty of a crime. Is this contention good?
5. Has a county power to buy real estate?
6. For what is the police power of a county usually exercised?
7. The statutes governing the county of Onondaga provided that all county contracts should be approved by the county solicitor. The county made a contract with Brown for the erection of a jail, but neglected to submit the contract to the county solicitor. In a suit on the contract Brown alleged that this omission was a very minor defect and could be waived by the county. Is the contract good?
8. May a county borrow money and issue negotiable paper therefor?
9. Have counties an inherent right to levy taxes?
10. What are proper purposes for which a county may levy a tax?
11. What must a person show who is suing a *quasi* corporation on its contract?
12. Is a *quasi* corporation liable in damages for a tort?

PART TEN

LIMITED PARTNERSHIPS AND PARTNERSHIP
ASSOCIATIONS

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CHAPTER XXXII

CERTAIN STATUTORY PARTNERSHIPS

(A) Limited partnerships

549. A limited partnership is one in which, in addition to the partners who are liable to the whole extent of their personal resources as at common law, there are one or more partners whose liability is limited to a specified amount. Such limitation of a partner's liability being unknown to common law, these associations are wholly of statutory origin.

550. The purpose of such statutes is to furnish a means whereby the energy and skill of men who lack capital may be aided by capitalists without danger to the latter of losing more than a specified amount. Now, it is of the first importance that the outside public be clearly notified as to the particulars of the limitation of liability, so that it may estimate accurately the basis of the firm's credit. Accordingly, the strictest compliance by the partners with the letter of the statutes providing for such notification is usually insisted upon by the courts.

CUMMINGS *et al.* v. HAYES, 100 Ill. App. 347 (1902). Hayes sued Cummings, Walker, and Howard as partners to recover for goods sold them. The defendants endeavored to establish that theirs was a limited partnership, and that Cummings and Howard were special partners and could not be held liable for firm debts. The partnership certificate had been signed by Walker and Howard personally, but Cummings's signature had been affixed by his attorney in fact and no power of attorney was recorded. *Held*, the

statute had not been substantially complied with and the general estates of all three defendants were liable.

MANHATTAN BRASS CO. v. ALLIN, 35 Ill. App. 336 (1889). The firm of Wilbur & Allin made an assignment for the benefit of creditors. Subsequent negotiations with the creditors resulted in an agreement whereby a new special partnership was to be formed, and the payment of what was due the special partners by the insolvent firm was to be postponed until the new one should have paid the other creditors of the old firm. The certificate and affidavit filed in organizing the new firm stated that the special partners had contributed "cash value in goods, wares, and merchandise and by cancellation of indebtedness for money borrowed from each of said special partners." A creditor sued on a note given pursuant to the terms of the agreement and the question arose whether or not Allin was entitled to protection as a special partner. *Held*, the contribution of those attempting to be special partners was not in strict compliance with the statute, and the notice to the creditors that the debtors expected to be bound only as special partners would not restrict their liability.

VANHORN v. CORCORAN, 127 Pa. 255 (1889). A statute authorized subscriptions to the capital of a limited partnership to be made in property other than cash. Corcoran and Richards attempted to form a limited partnership. The recorded certificate stated that Corcoran as special partner "paid in merchandise, lumber, book accounts, and bills receivable, transferred to this association, \$21,609.18, and in cash \$3,390.82, making a total subscription, \$25,000." VanHorn, a creditor of the firm, sued Corcoran, alleging that the certificate did not sufficiently describe the property contributed and that he was therefore liable as a general partner. *Held*, the description was insufficient and Corcoran was not protected from general liability.

551. These associations originated in Italy during the Middle Ages. Thence having spread to France, they were, so far as concerns this country, first imported into Louisiana when that state was a French colony. In 1822 New York adopted the principle from France, and thereafter

almost all the states successively made statutory provision for the limitation of liability in certain partnerships. All these state statutes are closely alike, with the exception of the Louisiana code, which shows more clearly its French origin. In fact, the statutes of many of the states are verbatim copies of one another, with occasional variations of more or less importance. Hence it will be possible in treating this subject to take up section by section the provisions common to all the states, noting variations below as exceptions. Louisiana, however, will have to be separately treated, since its form of statutory partnership differs widely from that of the other states.

1.—PURPOSES

552. The purposes for which limited partnerships may be formed are named as follows in the legislation of most of the states:

“Limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business within this state may be formed by two or more persons upon the terms, with the rights and powers and subject to the conditions and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purposes of banking or making insurance.”

553. Some noteworthy variations from this form are to be found among the states, although nearly all the states forbid their limited partnerships to do banking or make insurance. Several states expressly permit mining;¹ several permit agricultural business.² There are scattering provisions in favor of commercial business,³ and the trans-

¹ Connecticut, Georgia, Missouri, Montana, Nevada, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee.

² Florida, Georgia, Kentucky, New Jersey, Pennsylvania, Tennessee.

³ Arkansas, Florida, Georgia, Mississippi.

portation of passengers,¹ or certain freight.² An important group of states permits the transaction of "any lawful business except the business of insurance."³ In this group banking is, perhaps, permitted by inference.

2.—LIABILITY OF MEMBERS

554. The section as to liability of members is practically identical in all the states. It reads as follows:

"Such partnerships shall consist of one or more persons who shall be called general partners and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments a specified sum as capital to the common stock, who shall be called special partners and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital."

555. The last quoted section insisted upon "actual cash payments." The following states, however, permit the special partner to make his contribution in real or personal property at cash value: Arkansas, Colorado, Florida, Illinois, Kansas, Michigan, Nebraska, New Jersey, Pennsylvania, and Utah.

3.—CERTIFICATE OF PARTNERSHIP

556. The certificate of partnership and its contents are provided for in all the states in the following language:

"The persons desirous of forming such partnership shall make and severally sign a certificate which shall contain: (1) The name or firm under which such partnership is to be conducted. (2) The general nature of the business

¹ South Carolina.

² Kentucky, Missouri, New Jersey, Pennsylvania, South Carolina.

³ California, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Massachusetts, New Hampshire, Texas.

intended to be transacted. (3) The names of all the general or special partners interested therein, distinguishing which are general and which are special and their respective places of residence. (4) The amount of capital which each special partner shall have contributed to the common stock. (5) The period at which the partnership is to commence and the period at which it will terminate.”

557. Most states which permit a special partner to make his contribution otherwise than in money require a sworn statement and appraisal of the contribution.

SIEGEL BROTHERS v. WOOD et al., 3 Pa. Dist. 463 (1894). Siegel Brothers sued for the price of goods sold to a partnership doing business under the firm name of Haines & Company. Two of the defendants sought to avoid liability on the ground that they were special partners. Wood, as general partner of the firm, had filed a certificate and an affidavit of the contributions of the special partners which had been made in goods and merchandise, but the goods had not been first appraised under oath, as required by statute. For this reason it was claimed that the liability of none of the partners was limited. *Held*, the so-called special partners were liable as general partners.

558. All the states require that the certificate be acknowledged by all the parties signing it and that it be recorded in the county office, where deeds for real estate are recorded in a book to be kept there for that purpose and open to the public. This recording is to be done in the county where the firm has its principal place of business; if the firm desires to do business in other counties, a transcript of the record of the certificate and its acknowledgment shall be recorded in like manner in every such other county.

VANRIPER v. PAPPENHAUSEN, 43 N. Y. 68 (1870). Pappenhause and John Perzel formed a special partnership in the City of New York. Perzel was the general, and Pappenhause was the

special partner. The law regarding limited partnerships was complied with and the certificate filed and recorded in the proper county. The firm discontinued business in that county and commenced the same business in Kings County, but no certificate of the terms of the partnership was recorded in Kings County. Van-Riper sold them goods in Kings County and sued to recover his claim, alleging that Pappenhausen was liable as a general partner. *Held*, the failure to record any certificate in Kings County rendered the firm a general partnership, and all the members liable as general partners.

4.—AFFIDAVIT AS TO PAYMENT OF SPECIAL PARTNER'S CONTRIBUTION

559. Most states require that, at the time of the filing of the certificate and its acknowledgment, there shall be filed in the same office an affidavit by one or more of the general partners "stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock, have been actually in good faith paid in cash."

MYERS v. EDISON GENERAL ELECTRIC Co., 59 N. J. L. 153 (1896). The Edison General Electric Company sued for rent due by the firm of Poggi and Company, composed of William Poggi, Edith Poggi, and Charles Myers. Myers defended upon the ground that he was a special partner in the firm. The certificate and affidavit filed for the purpose of forming a limited partnership were dated and filed January 5, 1892. The affidavit stated that the sum contributed by the special partner had actually been paid in cash, while in fact the sum contributed by Myers was not paid until January 12, 1892. *Held*, the statement of the affidavit as to the payment was false within the meaning of the statute and Myers was liable as a general partner.

560. Of course those states which permit a contribution other than cash modify the wording of the affidavit accord-

ingly. Many states,¹ however, make no mention of such an affidavit.

5.—PUBLICATION OF NOTICE

561. All states require publication to be made for periods varying from four to six weeks in one or two newspapers as follows:

“The persons shall immediately publish the terms of the partnership, when registered, for at least [usually four] weeks immediately after such registry in [usually one] newspaper in the county in which such registry shall be made, and published in the district, or city, or town, in which their business shall be carried on, and if such publication be not made, the partnership shall be deemed general.”

562. A majority of the states require that such publication be proved by filing an affidavit thereto, made by the publisher of the paper in which it was printed, in the office where the certificate was filed.

6.—THE FIRM NAME

563. Most states make provision for the firm name as follows:

“The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted without the addition of the word ‘company’ or any other general term; and if the name of any special partner shall be used in such firm with his privity, he shall be deemed a general partner.”

BUCK v. ALLEY et al., 145 N. Y. 488 (1895). Buck sued on a note given by the firm of W. S. Alley & Co., which consisted of Alley, as general partner, and two special partners. Buck wanted

¹ Delaware, Indiana, Maine, Massachusetts, Montana, Nevada, Ohio, Oregon, Rhode Island, Vermont, Washington.

to hold the special partners liable as general partners because of the use of the words "& Co." in the firm name. *Held*, while the use of those words was prohibited, yet it did not make the special partners liable as general partners. The names of the special partners did not appear, and, so far as the firm name is concerned, the penalty of general liability is affixed in New York only where the name of a special partner is used therein with his acquiescence.

564. Many states, however, do not absolutely prohibit the use of " ' company ' or any other general term." ¹

565. A number of states ² make the following requirement:

"The said partnership shall put up, upon some conspicuous place on the outside and in front of the building in which it has its chief place of business, some sign on which shall be painted in legible English characters all the names in full of all the members of said partnership, stating who are general and who are special partners."

VANDIKE v. ROSSKAM, 67 Pa. 330 (1871). John Vandike and James H. Smith formed a limited partnership. The sign over the door of the firm's place of business bore only the name of James H. Smith. A dispute arose as to whether or not Vandike was a special partner. *Held*, since the name of Vandike, as special partner, did not appear on the sign, he was to be regarded as a general partner.

7.—KEEPING CAPITAL INTACT

566. The fund contributed by the special partners is sought to be preserved intact for the security of the outside public by the following provision:

"No part of the sum which any special partner shall have contributed to the stock shall be withdrawn by him,

¹ Colorado, Delaware, Illinois, Indiana, Minnesota, Montana, Nebraska, New York, Ohio, Pennsylvania, Rhode Island. Utah, Wisconsin, District of Columbia.

² Minnesota, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Wisconsin.

or paid, or transferred to him in the shape of dividends, profits or shares at any time during the continuance of the partnership, but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if after the payment of such interest any profits shall remain to be divided he may also receive his portion of such profits.

“ If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital.”

BAILY v. HORNTAL, 154 N. Y. 648 (1898). Lewis Hornthal was the special member of a limited partnership. At the termination of the firm it was insolvent, but the general partners voluntarily paid back to Hornthal the capital he had contributed. Creditors of the firm, who found no assets standing in its name, sued to recover the amount in the hands of Hornthal because he had received it from the general partners when they were insolvent. *Held*, the creditors could recover.

567. The same substance is provided for in different wording in some states,¹ while a few alter the provision by making the special partner liable as a general partner in case it is violated.²

BELL v. MERRIFIELD, 28 Hun (N. Y.) 219 (1882). Merrifield was the special partner in a firm to which he made a cash contribution. The firm became insolvent and was wound up. By arrangement with the general partners, Merrifield drew out his capital and profits. Firm creditors sued Merrifield as a general partner. *Held*,

¹ Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, Oregon, Rhode Island, Vermont, Virginia, Washington, West Virginia.

² Colorado, Florida, Missouri, North Dakota, South Dakota, Wyoming.

where a special partner, in violation of the statute, withdraws the capital contributed by him or any profits from the firm, and thereby reduces its original capital, he is liable as a general partner.

8.—ALTERATION

568. To preserve intact the identity of the firm, most states have a provision in the following terms regarding alteration:

“ Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matters specified in the original certificate, shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership.”

HARDT v. LEVY, 72 Hun (N. Y.) 225 (1893). The general creditors of a limited partnership doing business under the firm name of “Levy Bros. & Co.” sued all the members of the firm, alleging that the special partners were liable as general partners because of the admission of a new general partner. *Held*, the admission of the new general partner constituted an alteration and rendered the firm thereafter a general partnership, there having been no proper compliance with the formalities required in such cases.

569. A few states¹ permit the transfer of interests by special partners, providing for the recording of the change and forbidding the impairment of capital thereby, although a number of states² have no specific provision for alterations. Several³ contain the following severe blanket section:

¹ Kansas, Michigan, New Jersey, New York, Pennsylvania.

² Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Maine, Massachusetts, Montana, Nevada, Oregon, Rhode Island, Vermont, Washington.

³ Delaware, Indiana, Maine, Massachusetts, Montana, Nevada, Oregon, Rhode Island, Vermont, Washington.

“ In all cases not otherwise provided for in this Act, the members of limited partnerships shall be subject to all the liabilities and entitled to all the rights of general partners.”

9.—FRAUDULENT TRANSFERS AND PREFERENCES

570. In order to preserve the firm's resources intact and to prevent fraudulent preferences of creditors in the face of impending insolvency, the following is the common provision :

“ Every sale, assignment, or transfer of any of the property or effects of such partnership made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership under the like circumstances and with the like intent shall be void as against the creditors of such partnership.”

571. Moreover, in a number of states¹ the general or special partners are forbidden to dispose of their private property under like circumstances in the following words:

“ Every such sale, assignment, or transfer of any of the property, or effects of a general, or special partner made by such general, or special partner when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of the partnership with the intent of giving to any creditor of his own or of the partnership a preference over other creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with like

¹ Alabama, Arkansas, Georgia, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, Pennsylvania, South Carolina, Texas, Wisconsin.

intent shall be void as against the creditors of the partnership."

572. And the penalty for disobedience to this requirement is in many states¹ as follows:

"Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership or by any individual partner, shall be liable as a general partner."

CASOLA v. VASQUEZ, 164 N. Y. 608 (1900). Casola sued Vasquez, a special partner in the firm of Kugelman & Company, alleging that Vasquez had become liable as a general partner for money loaned by Casola to the firm. Vasquez, at a time when the firm was insolvent and with full knowledge of its condition, had received from it a transfer of certain assets made with intent to give him a preference over other firm creditors. *Held*, this preferential transfer made Vasquez liable as a general partner.

10.—SPECIAL PARTNERS NOT TO ACT FOR FIRM

573. It might naturally be inferred by a careless public that one transacting business for a partnership is a general partner. All the states therefore make provision to prevent such misapprehension by forbidding a special partner so to act. The following is a common form:

"A special partner may from time to time examine into the state and progress of the partnership concerns and may advise as to their management, but he shall not transact any business on account of the partnership or be employed for that purpose as agent or otherwise, and if he shall interfere contrary to these provisions, he shall be deemed a general partner."

¹ Alabama, Arkansas, District of Columbia, Florida, Georgia, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Wisconsin.

COLUMBIA LAND & CATTLE CO. v. DALY, 46 Kan. 504 (1891). Daly sued the Columbia Land & Cattle Company to recover the value of certain merchandise alleged to have been purchased by D. B. Powers as a "special partner" in the concern. *Held*, under the statute, Powers had no authority to bind the concern, so Daly was not entitled to recover.

574. Many states ¹ have instead the following provision :

"If he [the special partner] shall personally make any contract respecting the concerns of the partnership with any person except the general partners, he shall be deemed and treated as a general partner."

575. There are minor exceptions in some states permitting a special partner to act as attorney at law for his firm. The only substantial exceptions are in several states ² which permit a special partner to act for his firm provided the party with whom he deals is made aware of the fact that he is a limited partner.

11.—PENALTY FOR NONCOMPLIANCE WITH STATUTE

576. If any of the foregoing requirements are ignored, that is if there is an omission to make, acknowledge, record, and file the certificate, or to make and file the affidavit in those states which require it, or if any false statement is made ³ in the certificate or affidavit, then everyone interested in the partnership is usually liable, as a general partner is at common law, upon all the firm's obligations. Likewise, in those states which require publication of notice, failure to advertise as prescribed usually defeats a special partner's claim to limited liability. Likewise, if a firm

¹ Delaware, Indiana, Kentucky, Maine, Michigan, Montana, Nevada, New Hampshire, Rhode Island, Oregon, Vermont, Washington.

² Ohio, Oregon, Vermont, Washington.

³ Willfully false in the following states: California, District of Columbia, Maine, North Dakota, South Dakota, Wyoming,

name is used which violates a statutory provision. Likewise, if a special partner acts for the firm in disobedience to the statute, or if with his knowledge and consent there is an unlawful alteration of the firm's business or an unlawful diversion of its assets in any of the ways mentioned above.

577. It is quite important therefore that all the foregoing provisions for the formation of limited partnerships be exactly followed. Otherwise the courts consider that proper safeguards are not provided for the public which is invited to give credit to the firm. From the special partner's point of view the penalty of being held liable as a general partner is heavy enough to urge him not only to comply with the duties placed directly upon him, but also to see to it that his associates shall do the same. Good intentions or oversight will not be taken by the courts as an excuse.

12.—LAWSUITS BY OR AGAINST THE FIRM

578. Practically all the states provide that a lawsuit against this kind of partnership, or a lawsuit brought by it, shall be prosecuted against or by the general partners only. Special partners are not usually named in such suits except in those cases above mentioned where special partners by way of penalty are deemed general partners. In such cases all of those sought to be held as general partners may be joined as co-defendants.

13.—RENEWAL OF THE FIRM

579. The common provision for renewal of the firm when its term of existence has expired is as follows:

“Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be

certified, acknowledged, and recorded and an affidavit of a general partner be made and filed and notice be given in the manner herein required for its original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership."

DURGIN v. COLBURN, 176 Mass. 110 (1900). Durgin sued for the balance due on a note signed by Colburn, Fuller & Company. Frances Colburn, the defendant, contended that she was a special partner in the firm composed of George Colburn, Edward Fuller and herself. A certificate of renewal had been made upon the theory that the continuation of the special partner's interest in the assets of the expiring firm was a contribution to the capital of the new firm equal in amount to that originally contributed. But in fact the capital had been substantially impaired by losses in the old firm's business and no fresh capital had been supplied. *Held*, all the members of the new firm were liable as general partners.

580. Several states¹ require in addition a statement that the original capital is unimpaired.

14.—DISSOLUTION

581. "No dissolution of such partnership by the acts of the parties (or any dissolution except by operation of law) shall take place previous to the time specified in the certificate of its formation or in the certificate of its renewal, until a notice of dissolution shall have been filed and recorded in the office in which the original certificate was recorded and published once in each week for four weeks in a newspaper in each of the counties where the partnership may have places of business." This means that the partners may not terminate the firm's existence by agreement between themselves unless the above-named requirements are complied with.

¹ Connecticut, Kentucky, Missouri, North Carolina.

15.—INSOLVENCY

582. In case of insolvency, the following provision is made:

“ In the case of insolvency or bankruptcy of the partnership, no special partner shall under any circumstances be allowed to claim as creditor until the claims of all the other creditors of the partnership shall be satisfied.”

Savage v. Carney, 47 S. W. (Tenn.) 571 (1898). Carney attempted to become a special partner of a firm, but by failure to comply with the statute he was liable to the firm's creditors as a general partner. He owed money to the firm on a current account. The firm became insolvent and Savage, as the assignee in insolvency, sued Carney to recover his indebtedness. Carney held the firm note for a debt and sought to use it as a set-off against his indebtedness. *Held*, he could not set off such note against the account because of the statute postponing claims of special partners to all outside creditors in case of insolvency.

583. Yet in some states¹ the rigor^o of this prohibition is modified to permit a special partner who has made loans to or advanced money for the firm over and above the amount of his stipulated contribution to its capital to recover these loans or advances on an equality with creditors outside the firm.

In re Price, McCormick & Co., 69 N. Y. App. Div. 37 (1902). Crocker, a special partner in the brokerage firm of Price, McCormick & Company, was also a customer of the firm. The firm failed and assigned for the benefit of creditors. At that time it held a number of shares of stock for Crocker on which he was indebted to the firm in a large amount. After the failure he tendered to the assignee the amount due by him to the firm and demanded the stock. The assignee was unable to comply with such demand because the firm had hypothecated the stock as collateral security for loans made to

¹ Colorado, Michigan, Minnesota, North Dakota, New Hampshire, New York, South Dakota, Wyoming.

the firm by various bankers. Crocker, with the assignee's consent, went to these bankers and procured his stock by paying the market price thereof, which amounted to \$62,350.51 more than the amount which he owed the firm. He sought to recover this amount from the firm's assets, but the assignee claimed that because he had been a special partner he was not entitled to payment until the claims of all other creditors were first satisfied. *Held*, as Crocker was obliged to pay a sum in excess of his indebtedness in order to obtain his property, he was entitled to share equally with other creditors.

16.—LIMITED PARTNERSHIPS IN LOUISIANA, KNOWN AS PARTNERSHIPS *in commendam*

584. (a) *Formation*.—Special partnerships, called partnerships *in commendam*, are formed under the Civil Code in force in Louisiana by a contract whereby one person or partnership agrees to furnish another person or partnership a certain amount either in property or money to be employed by the person or partnership to whom it is furnished in his or their own name or firm, on condition of receiving a share of profits in the proportion determined by the contract and of being liable to losses and expenses to the amount furnished and no more. The person whose liability is so limited is called a partner *in commendam*.

(b) *Purposes*.—As every kind of partnership may receive such partners, it is only a modification, rather than a separate division, of partnership.

(c) *Liability of members*.—The partner *in commendam* shall be liable only to pay the sum which he has agreed to furnish by his contract except in the cases of penalties for noncompliance with the code hereafter to be noticed. If his contribution has been paid and lost in the business, he is exonerated from further payment. If a part be unpaid, he is liable for that part only to the creditors of the partnership.

(d) *Certificate of partnership*.—The contract of part-

nership *in commendam* must be in writing, otherwise the partner *in commendam* will be considered as a general partner in the firm. This contract must set forth the amount furnished, or agreed to be furnished, by the partner *in commendam*, the share of the profits he is to receive, and the share of expenses and losses he is to bear, also whether the contribution has been already received and whether in goods or money or otherwise, and if it has not been received the contract must contain a stipulation to pay. The contract must be signed by the parties in the presence of one or more witnesses and must be recorded in full by the officer authorized to record mortgages in the place where the principal business of the partnership is carried on. If the partnership has several establishments in different parts of Louisiana, such recording shall be made in each place where the firm has establishments. The officer authorized to record mortgages shall keep a separate book for the purpose of recording acts of partnership, which shall be open to the public at all office hours. The contract must be acknowledged by each signer before a notary.

(e) *The firm name.*—The business of the partnership must not be carried on in the name of the partner *in commendam* or in his name jointly with others, and if there be only one general partner, he must carry on the business in his sole name without the addition of the words “and company” or other general term which might cause it to be understood that he has partners.

(f) *Keeping the special contribution intact.*—The partner *in commendam* cannot be called upon by the partnership or its creditors to refund any dividend of net profits fairly made during the solvency of the partner. By implication, therefore, if a dividend were made in bad faith and not out of net profits, the partner *in commendam* might be compelled to refund it for the benefit of creditors of the firm defrauded thereby.

(g) *Fraudulent transfers*.—The partner *in commendam* cannot withdraw his contribution at a time when those to whom he has advanced it are in failing circumstances or when there is reasonable apprehension that they will become insolvent.

(h) *Special partner not to act for firm*.—The business of the firm must not be carried on by the partner *in commendam* shall take any part in the business of the partner—other partners, but only by the general partners.

(i) *Penalty for noncompliance*.—If the partner *in commendam* shall take any part in the business of the partnership or permit his name to be used in the firm, or knowingly permit any general partner where there is only one general partner to add words to his name, such as “and company” that imply that he has other partners beside the partner *in commendam* when in fact he has none, such partner *in commendam* shall be liable as a general partner in the business to which he has made contribution.

(j) *Dissolution*.—If the general partner or partners shall use the name of the partner *in commendam* in the firm without his consent, or if, not having any other partner, he shall adopt any such addition as was expressed in the last paragraph, the partner *in commendam* may immediately withdraw the sum he has advanced and on giving notice in two newspapers shall be freed from all responsibility either to the partners or to other persons from the time of such notice.

(B) Partnership associations

585. A limited partnership having been defined above as one in which, in addition to the partners who are liable to the whole extent of their personal resources as at common law, there are partners whose liability is limited to a specific amount, a partnership association may be distin-

guished as one in which the liability of all partners is limited to a specific amount. The limitation of liability in this case is also purely a matter of statutory authority and strict compliance with the letter of the statute is, for the benefit of the outside public, insisted upon by the courts.

586. The only states which have authorized by statute this form of partnership are Michigan, New Jersey, Ohio, Pennsylvania, and Virginia, and the statutes of these states are nearly identical. Accordingly, the important provisions of these acts may be successively noted here section by section.

1.—FORMATION

587. “ When any three or more persons may desire to form a partnership association for the purpose of conducting any lawful business or occupation within the United States, or elsewhere, whose principal office or place of business shall be established and maintained within this state, by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge before some officer competent to take the acknowledgment of deeds a statement in writing, in which shall be set forth the full names of such persons and the amount of capital of said association subscribed for by each; the total amount of capital and when and how to be paid;¹ the character of the business to be conducted and the location of the same; the name of the association with the word “ limited ” added thereto as part of the same; the contemplated duration of said association which shall not in any case exceed twenty years; and the names of the officers of said association selected in conformity with the

¹ Ohio requires that one-third be paid within thirty days after the filing of the statement with the county recorder and the remainder within twelve months thereafter.

provisions of this act. And any amendment of said statement shall be made only in like manner; which said statement and amendment shall be recorded in the office of the recorder of deeds of the proper county."

2.—CONTRIBUTIONS OTHER THAN CASH

588. "It shall be lawful for any persons desiring to form a partnership association under this act to make contribution to the capital thereof in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association; provided that in the statement required to be recorded by the first section of this act, subscriptions to the capital whether in cash or property shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing and with a description and valuation of the property so contributed shall be inserted."¹

3.—LIABILITY OF MEMBERS

589. "The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against such association or for any debt or engagement of such company further or otherwise than as hereinafter provided; that is to say, if any execution or other process in the nature of execution either at law or in equity shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy or enforce such execution or other process, then such execution or other process may be issued against any of the members to the extent of the proportions

¹ There is in Virginia no provision for making the contribution otherwise than in cash.

of their subscriptions respectively in the capital of the association not then paid up; provided always ¹ that no such execution shall issue against any member except upon an order of court or of a judge of the court in which the action, suit or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association showing the names of the members thereof and the amount of capital remaining to be paid upon their respective subscriptions and from them or other sources of information ascertain the truth in regard thereto and may order execution to issue accordingly; and the said association shall be, and it is hereby, required to keep a subscription list book for that purpose, and the same shall be open to inspection by creditors and members of the association at all reasonable times."

4.—THE FIRM NAME AND SIGN

590. The word " limited " shall be the last word of the name of every partnership association formed under the provisions of this act and every such association shall paint or affix and shall keep painted or affixed its name on the outside of their office or place in which the business of the association is carried on in a conspicuous position in letters easily legible, and shall have its full name mentioned in all notices, advertisements and other official papers of such association and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, or other writings used in the transaction of the business of the partnership association; provided that the omission of the word " limited " in the use of the name of the partnership association shall render each and every person participant in such omission or knowingly acquiescing there-

¹ New Jersey omits this proviso.

in liable for any indebtedness, damage or liability arising therefrom.

5.—THE TRANSFER OF SHARES

591. “Interests in said association shall be personal estate and may be transferred under such rules and regulations as the association may prescribe; but no transferee of any interest or representatives of any decedent or of any insolvent shall be entitled thereafter to any participation in the subsequent business of said association unless he or she be elected thereto by a vote of a majority of the members in number and value of their interests; and any change of ownership whether by sale, death, bankruptcy, or otherwise which shall not be followed by election to the association shall entitle the owner only to his interest in the association at a price and upon terms to be mutually agreed upon; and in default of such agreement the price and terms shall be fixed by an appraiser appointed by the court of the proper county subject to the approval of said court.”

6.—MANAGEMENT OF THE BUSINESS

592. “There shall be at least one meeting of the association in each year at one of which there shall be elected not less than three or more than five managers¹ of said association, one of whom shall be the chairman,² one the treasurer, and one the secretary, or one may be both treasurer and secretary, who shall hold their respective offices for one year and until their successors are duly installed; and no debt shall be contracted or liability incurred for said association except by one or more of said managers and no liabil-

¹ In Pennsylvania the maximum is nine.

² Called president in Virginia.

ity for an amount exceeding five hundred dollars¹ except against the person incurring it shall bind the association unless reduced to writing and signed by at least two managers."

7.—PROFITS

593. "The association may from time to time divide the profits of its business in such manner and in such an amount as a majority of its managers may determine, which profits so divided shall not at any time diminish or impair the capital of said association; and any one consenting to a dividend which shall diminish or impair the capital shall be liable to any person or persons interested or injured thereby to the amount of such diminution or impairment."

8.—LOANS OF CREDIT OR CAPITAL

594. "It shall not be lawful for such association to loan its credit, its name, or its capital to any member of said association, and for such loan to any other person or association the consent in writing of a majority in number and value of interest shall be requisite."²

9.—REAL ESTATE

595. "All real estate owned or purchased by any association created under and by virtue of this act shall be held and owned and conveyance thereof shall be made in the association name.³ Whenever any association formed under this act shall have occasion to execute any deed of conveyance or bonds with or without coupons and mortgages to secure purchase or borrowed moneys, such associa-

¹ In Virginia two hundred dollars.

² Michigan permits the credit of the association to be loaned only for the benefit of the regular business of the association; Ohio forbids entirely the loan of its credit, its name, or its capital.

³ Virginia omits this section.

tion shall have a right to acknowledge such instrument by their chairman and secretary.”¹

10.—LAWSUITS BY AND AGAINST THE ASSOCIATION

596. “ Said association shall sue and be sued in their association name and when suit is brought against any such association, service thereon shall be made upon the chairman, secretary or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association.”²

11.—DISSOLUTION

597. “ Such association may be dissolved: (1) Whenever the period fixed for the duration of the association expires. (2) Whenever by a vote of a majority in number or value of interest it shall be so determined, and notice of such winding up shall be given by publication in two newspapers published in the proper city or county at least six ‘consecutive times;’³ and immediately upon the commencement of such advertising said association shall cease to carry on its business except so far as may be required for the beneficial winding up thereof.”

12.—DISTRIBUTION OF ASSETS

598. “ Whenever any such partnership association shall be dissolved by the voluntary action thereof, its property shall be applied and distributed as follows: (1) To the

¹ New Jersey and Pennsylvania allow partnership associations to adopt and use a common seal.

² Pennsylvania permits service upon any agent or clerk or upon a director or manager of such association.

³ In Michigan four times.

payment of all debts for wages of labor.¹ (2) To the satisfaction of its other liabilities and indebtedness. (3) After payment thereof, the same shall be distributed to and among the members thereof in proportion to their respective interests in the following manner: (4) Three liquidating trustees shall be elected by the members of the association, who shall have full power and authority to wind up the concern and distribute any assets thereof among the members under the direction of the court of the proper county.”

QUESTIONS

1. What is a limited partnership? What was the purpose of the law in providing for the formation of such associations?

2. State briefly the origin of limited partnerships.

3. To carry on what businesses may limited partnerships be formed in your state? May such associations do a banking business? May they do an insurance business?

4. Who is a general partner? Who is a special partner? What is the liability of each?

5. Must a special partner's contribution be made in cash or may it be made in property?

6. What must be contained in the certificate of partnership? How is it executed and where is it recorded?

7. What other paper must be filed along with the certificate?

8. How must notice be given to the public of the formation of a limited partnership?

9. Wilkins, Budd, and Pritchard formed a limited partnership, Wilkins and Budd being general partners and Pritchard being a special partner. They traded under the firm name of “Wilkins, Budd & Pritchard.” The association failed, and Wescott, a creditor, sued Pritchard as a general partner. Can Wescott properly do this?

10. What provision is made for preserving intact for the benefit of the creditors of the firm the contribution made by the special partners?

¹ In Ohio the separate estate of each partner is liable without limitation for such claims.

11. Lee and Russell were the special and the general partners, respectively, in a flour-milling business. They admitted Sutton as a general partner without making any change in their certificate of association. The new firm failed and a creditor sought to hold Lee responsible as a general partner. Is Lee liable as a general partner?

12. May the interest of a special partner be transferred?

13. Burroughs, Peacock, and Bond were partners in the ice cream business. Burroughs and Peacock were special partners. Bond was a general partner. The business failed and the firm with Bond's knowledge and passive consent executed a mortgage on the only realty owned by the firm to Jordan, one of the firm's creditors. The other creditors had the mortgage set aside and then endeavored to hold Bond liable as a general partner. Can they do this?

14. Who conducts the business of the firm?

15. What is the penalty for failing to comply with all the statutory requirements in forming and carrying on a limited partnership?

16. In what names are lawsuits by and against the firm prosecuted?

17. How is a limited partnership renewed when it has been dissolved by expiration of the time fixed in its certificate?

18. King loaned \$1,000 to a limited partnership of which he was a special partner and took the firm's mortgage as security. One year later the firm became insolvent. The outside creditors sought to prevent King from realizing on his mortgage. Will they succeed?

19. What is a partnership *in commendam*?

20. Are there any restrictions as to the kinds of partnership which may receive partners *in commendam*?

21. Is it necessary to make any public record of the formation of a partnership *in commendam*?

22. What provision is made as to the firm name and as to keeping the firm's capital intact?

23. May a partner *in commendam* act for the firm?

24. What is a partnership association? Distinguish it from a limited partnership.

25. Describe the formation of a partnership association.

26. May contributions to the capital be made in property?

27. Is any member of a partnership association unlimitedly liable for the firm's debts?

28. What word is necessary in the title of all partnership associations?

29. How are shares transferred? How are these associations managed?

30. In what name is the concern's real estate held? When and how is a partnership association dissolved?

APPENDIX A

(See Chapter III)

THE following paragraphs sketch the various steps to be taken in each of the several states and territories, in order to secure a charter. Only purely private business corporations are here treated unless the context indicates otherwise. It is therefore to be understood that the rules laid down hereunder do not in many instances apply to banking and trust companies, railroad and navigation companies, insurance, telegraph, and telephone companies, and other corporations which have public or semi-public functions to perform. Special statutory provisions govern the formation of corporations, such as those above mentioned, which do not permit of adequate treatment in this work.

ALABAMA

Any three or more persons may become a body corporate. There is no requirement as to citizenship.

1. FIRST STEP

A certificate of incorporation should be drawn up. This must be signed by all the subscribers to the capital stock named therein, and must contain: (1) Name of proposed corporation. (2) Object or objects. (3) Location of the principal office in Alabama. (4) Total amount of authorized capital stock, not less than \$2,000, number of shares into which it is divided, and the amount with which the corporation will begin business, which must not be less than 25% of the authorized capital and in no case less than \$1,000. If several classes of stock are provided for by the certificate of incorporation, the terms on which each class is to be issued must be described. (5) Name and post-office address of officer or agent, designated by the

incorporators to receive subscriptions to stock. (6) Names and post-office addresses of the incorporators, and the number of shares subscribed by each (the aggregate whereof shall be the capital stock with which the company will commence business), and also the names and the post-office addresses of the officers and the directors for the first year. (7) Duration of corporate existence, if limited.

The certificate must have attached to it a statement under oath by the person authorized by the incorporators to receive subscriptions to the capital stock, showing the amount of capital which has been paid in, and the amount of stock secured by contracts for stipulated labor or services or for the transfer of property, which amount so paid in and secured shall be at least 20% of the stock subscribed for, and in no case less than \$1,000. The statement shall also include a copy of the subscription list and show (1) which subscribers have paid in cash and the amount of their subscriptions, (2) which subscribers have contracted in writing for the performance of labor or services or the transfer of property.

2. SECOND STEP

The certificate of incorporation should then be filed and recorded in the office of the Probate Judge of the county in which the principal place of business of the corporation is to be established.

3. THIRD STEP

After recording it, the Probate Judge indorses on the certificate of incorporation a statement that it is duly registered.

4. FOURTH STEP

When the certificate has been prepared, recorded, and filed as above noted, the incorporators, their successors, and assigns, constitute a body corporate under the name set forth in the certificate. They may then proceed with the organization of the company. Ten days after the filing of the certificate of incorporation in the office of the Probate Judge, he must file in the Secretary of State's office a statement signed by a Probate Judge of the county where the corporation was organized, giving (1) name of corporation, (2) names of incorporators, (3) date of incorporation, (4) amount of authorized capital stock, (5) amount of capital stock paid in, (6) name of county where incorporated.

COSTS

At the time of filing the certificate, the incorporators must pay to the Probate Judge for the use of the state \$1 for each \$1,000 of the capital stock. The minimum fee is \$5. The Probate Judge must be paid also fifteen cents for every hundred words in the certificate

of incorporation and \$2.50 for examining it. The Secretary of State is paid 50 cents for filing the Probate Judge's statement. Corporations beginning business after July 1st pay one half the annual franchise tax which is:

| | | | |
|-------|---|--|--|
| \$10 | on capital stock not exceeding \$10,000 | | |
| \$15 | " " " " between \$10,000 and \$25,000 | | |
| \$25 | " " " " " \$25,000 and \$50,000 | | |
| \$50 | " " " " " \$50,000 and \$100,000 | | |
| \$75 | " " " " " \$100,000 and \$200,000 | | |
| \$125 | " " " " " \$200,000 and \$300,000 | | |
| \$170 | " " " " " \$300,000 and \$400,000 | | |
| \$200 | " " " " " \$400,000 and \$500,000 | | |
| \$300 | " " " " " \$500,000 and \$1,000,000 | | |
| \$500 | " " " " exceeding \$1,000,000. | | |

ALASKA

Three or more adult persons, *bona fide* residents of Alaska, may form a corporation.

1. FIRST STEP

All the incorporators must subscribe and swear to the written articles of incorporation prepared in triplicate. These articles must contain (1) name of corporation, nature and character of business, and principal place of transacting same, (2) time of commencement and duration of corporate existence, not to exceed fifty years, (3) amount of capital stock of said corporation, how the same shall be paid in, and the number and par value of the shares, (4) the highest amount of indebtedness or liability to which said corporation shall at any time be subject, (5) names and places of residence of the persons forming such corporation, (6) names of the first board of directors, and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same shall be elected and their terms of office.

2. SECOND STEP

One copy of such articles shall be filed in the office of the Secretary of the District of Alaska, and another in the office of the clerk of the district court of the recording division where the company's principal place of business is intended to be located. The third shall be retained in the company's possession. Each copy so filed shall be recorded by the officer with whom filed, in a book to be kept by him for that purpose.

Costs

To the Secretary of the District of Alaska for filing the certificate, \$5. For recording three folios or less, \$1; each additional folio, 30 cents.

ARIZONA

There may be any number of incorporators who need not be residents.

1. FIRST STEP

The incorporators must adopt articles of incorporation, which shall be signed and acknowledged by at least two of them, as deeds are required to be acknowledged, and shall be recorded in a book for that purpose in the office of the Recorder of the county where the principal place of business is to be. The articles of incorporation must contain: (1) names of the corporators, name of the corporation and its principal place of business; (2) general nature of the business proposed to be transacted; (3) amount of capital stock authorized, and the time when and the conditions upon which it is to be paid in; (4) the time of the commencement and of the termination of the corporation; (5) by what officers or persons the company's affairs are to be conducted and the times at which they are to be elected; (6) the highest amount of indebtedness or liability to which the corporation is at any time to subject itself; (7) whether or not the private property of the stockholders is to be exempt from corporate debts. Unless so exempted, stockholders are liable for the debts of the corporation in the proportion which their stock bears to the whole capital stock.

2. SECOND STEP

The incorporators file a copy of the articles of incorporation, certified by the Recorder of the county where said articles are recorded, in the office of the Territorial Auditor, and have the same recorded by him in a book kept for that purpose. Such articles of incorporation must specify the highest amount of indebtedness and liability, direct or contingent, to which the corporation is at any time to be subject, which must in no case exceed two thirds of the amount of the capital stock.

3. THIRD STEP

Every corporation shall advertise at least six times in some newspaper published in the county in which the principal place of business is located, a copy of its articles of incorporation, and, upon the expiration thereof, file an affidavit in the office of the Territorial Auditor, stating that such publication has been made according to law. This affidavit should be so filed within three months from the date of the filing with the County Recorder. In the Territorial Auditor's office should also be filed a statement of the company's appointment as its Statutory Agent of some person who has been for at least three years a resident of Arizona. Upon this agent all notices and legal processes may be served.

COSTS

To the County Recorder for recording articles of incorporation, 20 cents for every hundred words; also 75 cents for the seal and certificate to same. To the Territorial Auditor for filing articles of incorporation, \$10; for filing affidavit of publication of articles of incorporation, \$3; for filing appointment of Statutory Agent, \$3; for issuing certificate of filing of articles of incorporation, \$3.

ARKANSAS

Any number of persons, not less than three, may form a corporation. There is no residential requirement.

1. FIRST STEP

Two or more of the incorporators prepare and sign written articles of association, containing: (1) name of corporation; (2) names of incorporators; (3) location of place of business and office; (4) general nature of the business; (5) amount of capital stock and amount subscribed by the incorporators; (6) number of shares and par value, which must be \$25 or \$100; (7) number of directors not less than three.

2. SECOND STEP

Any two or more of the associates may call the first meeting of the corporation at such time and place as they may appoint, by giving notice in any newspaper published in the county where such corporation is to be established, or in any adjoining county, at least fifteen days before the time appointed for such meeting. Said notice may be waived by a writing signed by all the subscribers to the capital stock, specifying the time and place for the first meeting, which writing shall be entered on the records of the corporation. At this meeting the incorporators may adopt by-laws and elect directors, who in their turn elect the officers.

3. THIRD STEP

The president and directors file the articles of association and also a certificate setting forth the purposes for which the corporation is formed, the amount of its capital stock, the amount actually paid in, the names of its stockholders and the number of shares owned by each, with the County Clerk of the county where the corporation is to have its principal place of business. They also file the said articles and certificate, bearing the County Clerk's indorsement in the office of the Secretary of State. Upon such filing and the payment of \$5 to the Secretary of State, he issues to the incorporators a certificate of authority to transact business.

COSTS

To the State Treasurer: for an authorized capital stock of \$50,000 or less, \$25; for an authorized capital stock between \$50,000 and \$100,000, \$75; for each additional \$100,000 or part thereof, \$25. To the County Clerk: for filing and recording articles, 10 cents per folio. For certificate, \$1.

CALIFORNIA

There must be three or more incorporators, of whom a majority must be residents of the state.

1. FIRST STEP

Articles of incorporation must be subscribed and acknowledged by all the incorporators. These articles contain (1) the name of the corporation; (2) its purpose; (3) place where its principal business is to be transacted; (4) duration, not to exceed fifty years; (5) number of its directors or trustees, which shall not be less than three, and the names and residences of those who are appointed for the first year; (6) the amount of its capital stock, if any, and the number of shares into which it is divided; (7) if there is a capital stock, the amount actually subscribed and by whom.

2. SECOND STEP

The articles of incorporation must then be filed in the office of the County Clerk of the county where the principal business of the company is to be transacted.

3. THIRD STEP

A copy of the articles of incorporation, certified by the County Clerk, is then filed with the Secretary of State who, upon payment of the required fees, issues a certificate showing that a copy of the articles containing the required statement of facts has been filed in his office. Thereupon the persons signing the articles and their associates and successors shall be a body corporate.

COSTS

| | | | | |
|---|---|---|--|------|
| To the Secretary of State for affixing certificate and seal of state unless otherwise provided for, | | | | \$2 |
| For filing articles of incorporation, | | | | |
| Where the capital stock is \$25,000 or less, | | | | \$15 |
| " | " | " | " " between \$25,000 and \$75,000 | 25 |
| " | " | " | " " " 75,000 and 200,000 | 50 |
| " | " | " | " " " 200,000 and 500,000 | 75 |
| " | " | " | " " " 500,000 and 1,000,000 | 100 |
| " | " | " | " " over \$1,000,000 for each additional \$500,000, or fraction thereof, | \$50 |

| | |
|--|---------------------|
| For recording articles of incorporation, . . . | 20 cents per folio. |
| For issuing certificate of incorporation, . . . | \$3 |
| For filing notice of appointment of agent, . . . | 5 |

To the County Clerk, for filing and indexing articles of incorporation \$1. An additional sum must be paid on account of the first year's license fee. This varies in accordance with the time when the charter papers are filed and with the amount of a company's capital.

COLORADO

There must be three or more incorporators.

1. FIRST STEP

The incorporators make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, certificates in writing, which state (1) the name of the company; (2) its objects; (3) the amount of its capital stock; (4) duration, not to exceed twenty years; (5) the number of shares of which said stock shall consist; (6) the number of directors or trustees of said company and the names of those who shall manage its affairs during its first year; (7) the name of the town or place, and the county, in which the principal office of the company shall be kept, and the name of the county in which the principal business shall be carried on; (8) if part of the company's business is to be carried on beyond the state, this fact should also be mentioned.

2. SECOND STEP

File one of the said certificates in the office of the Recorder of Deeds in such county or counties, and one in the office of the Secretary of State.

3. THIRD STEP

When the certificates have been filed as aforesaid, the Secretary of State records the same in his office.

COSTS

To the Secretary of State, an organization tax of \$20 for first \$50,000 of capital stock or fraction thereof, and 20 cents for each additional \$1,000; an annual corporation license tax payable on incorporating of two cents for each \$1,000 of capitalization.

To the County Recorder, fifteen to twenty-five cents for filing; fifty cents to \$2 for recording.

Two dollars and fifty cents for recording certificate of incorporation if not over five folios, and 15 cents for each additional folio.

CONNECTICUT

There must be three or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators prepare, sign and swear to articles of incorporation, setting forth: (1) name of corporation; (2) name of town in Connecticut where corporation is to be located; (3) the nature of the business to be transacted or the purposes to be promoted; (4) the amount of authorized capital stock, which shall not be less than \$2,000, the number of shares into which the same is divided, and the par value of each share, which shall not be less than \$25, and if there be more than one class of stock, a description of the different classes with the terms on which they are respectively created; (5) the amount of capital stock with which the corporation shall commence business, not less than \$1,000; (6) the period, if any, limited for the duration of the corporation.

2. SECOND STEP

The certificate must then be filed in the office of the Secretary of State, who examines same. If he finds that it conforms to law and that all taxes which may be due upon the filing of the certificate have been paid, he indorses thereon the word "Approved" with his name and official title, and records such certificate in a book kept by him for that purpose.

3. THIRD STEP

A copy of the certificate of incorporation, duly certified as above by the Secretary of State, is filed in the office of the Town Clerk of the town where the corporation is to be located. The Town Clerk records the same in a book kept by him for that purpose.

COSTS

To the Secretary of State, where the total authorized capital is \$50,000 or less, \$25; if the total authorized capital stock exceeds \$50,000, 50 cents per \$1,000 up to \$5,000,000, and then 10 cents per \$1,000 for any amount in excess of \$5,000,000.

For preparing forms for certificates, for recording same, and for copies of certificates, 50 cents per page. Minimum fee, \$1.

DELAWARE

Corporations may be organized by any number of persons not less than three. There is no residential requirement.

1. FIRST STEP

The incorporators prepare, execute, and acknowledge a certificate of incorporation, setting forth; (1) name of the corporation; (2) name of place within the county where its principal place of business in the state is to be located and the name of its resident agent; (3) nature of the business proposed to be transacted; (4) the amount of the total authorized capital stock, which shall not be less than \$2,000, the number of shares into which it is divided and the par value of each share; the amount of capital stock with which it will commence business, not less than \$1,000; and if there be more than one class of stock created by the certificate, a description of the different classes with the terms on which each is to be created; (5) the names and residences of the subscribers to the capital stock; (6) time of corporate existence, whether perpetual or limited; (7) whether or not private property of the stockholders shall be subject to the payment of corporate debts, and if so, to what extent.

2. SECOND STEP

The original certificate and a copy thereof are forwarded to the Secretary of State. If the documents are in proper shape, the Secretary of State files and records the original certificate and certifies and returns the copy.

3. THIRD STEP

The copy of the certificate of incorporation, certified by the Secretary of State, is recorded in the office of the Recorder of Deeds of the county in which the corporation's principal place of business is to be located.

COSTS

To the Secretary of State for each \$1,000 of authorized capital stock, 10 cents. Minimum fee, \$10. When the authorized capital exceeds \$2,000,000, 5 cents on each \$1,000 of the excess. For filing and indexing the certificate of incorporation, \$2. For copying and certifying, 2 cents per line. To the Recorder of Deeds for recording certificates, one cent per line.

DISTRICT OF COLUMBIA

Three or more persons may incorporate.

1. FIRST STEP

The incorporators sign and acknowledge a certificate of incorporation, setting forth: (1) name of the company and object for which it is formed; (2) term of existence, which may be perpetual; (3) amount of capital stock and number of shares into which it

shall be divided; (4) number of trustees who shall manage the concern for the first year, with their names and their citizenship; a majority of the trustees must be citizens of the District; (5) place in the District where the operations are to be carried on and the post office address therein of the corporation.

2. SECOND STEP

This certificate is then filed in the office of the Recorder of Deeds. The Recorder will not file the same unless proof is furnished that all the capital stock has been subscribed in good faith, and that at least 10% thereof has been paid for in cash and that said amount is in the possession of the first board of trustees named in the certificate. A statement to this effect must be sworn to by the incorporators or trustees and a certificate, sworn to by the proper officer of some banking or trust company, that such sum is in cash on deposit to the credit of the trustees, must be made part of this statement, which is filed with the Recorder of Deeds. A list of the subscribers must be attached to the statement.

COSTS

To the Recorder of Deeds for filing, recording and indexing the articles of incorporation, 50 cents for the first 200 words or less, and 15 cents additional for each 100 words in excess of 200. Also 40 cents on each \$1,000 of capital stock mentioned in this certificate. Minimum fee, \$25.

FLORIDA

There must be three or more incorporators. No residential requirement is made.

1. FIRST STEP

The charter is signed and acknowledged by all the incorporators. It sets forth (1) corporate name and place or places of business; (2) general nature of business to be transacted; (3) amount of capital stock authorized, number and par value of the shares into which it is divided, and the terms and conditions on which it is to be paid in; (4) duration of corporate existence, which may be perpetual; (5) by what officers the business of the company is to be conducted, when they will be elected, and the names of the officers who are to conduct the business until those elected at the first election shall be qualified; (6) highest amount of corporate indebtedness or liability which may be incurred; (7) names and residences of the subscribers, and the amount of stock subscribed by each, the total to be not less than 10% of the authorized capital stock.

2. SECOND STEP

Publication of charter together with notice of intention to apply for letters patent thereon in a newspaper published in the county where the place of business will be located once a week for four consecutive weeks.

3. THIRD STEP

The charter, with proof of publication, is presented to the Governor, who examines and approves it, if it is in proper form.

4. FOURTH STEP

The charter is then filed and recorded in the office of the Secretary of State. Letters patent and a certified copy of the charter are issued by the Secretary of State to the corporation.

5. FIFTH STEP

The letters patent and certified copy of the charter are then recorded in the office of the clerk of the circuit court of the county where the principal place of business is located.

6. SIXTH STEP

Duplicate affidavits by the treasurer that 10% of the capital stock has been subscribed and paid, must be filed with the Secretary of State and with the clerk of the circuit court of the county where the principal place of business is located.

COSTS

To the Secretary of State, \$2 upon each \$1,000 of capital stock. Minimum charge, \$5. Maximum charge, \$250. For certificate and seal, \$2; for copies and recording, 20 cents for first 100 words, and 10 cents for every succeeding 100 words. For filing charter, \$1. To the clerk of the circuit court, 25 cents for first 100 words and 10 cents for each succeeding 100 words.

GEORGIA

There must be more than one incorporator, but there is no residential requirement.

1. FIRST STEP

A declaration is prepared by the incorporators. This should set forth: (1) objects of the association and the particular business proposed to be carried on; (2) corporate name; (3) amount of capital employed and amount actually paid in; (4) place of doing

business; (5) time, not exceeding twenty years, for which corporation is desired.

2. SECOND STEP

This declaration, which is in the form of a petition to the superior court of the county where the incorporators desire to transact business, must be filed in the office of the clerk of that court.

3. THIRD STEP

Publication of the declaration of incorporation once a week for four weeks in the gazette published nearest to the point where the business is to be located. After such publication the court issues an order granting the application.

4. FOURTH STEP

Recording the petition and order by the clerk in the "Record of Superior Court Charters" and on the minutes of the court.

COSTS

To the clerk of the court for filing papers, about \$15; certified copy of charter, \$2.50. To the tax collector of the county where the business is to be carried on, as the annual license tax for the first year,

| | | | |
|-----|--------------------------|-----------------------|------------|
| \$5 | on capital not exceeding | \$25,000. | |
| 10 | " " between | \$25,000 and | \$100,000. |
| 25 | " " " | 100,000 and | 300,000. |
| 50 | " " " | 300,000 and | 500,000. |
| 75 | " " " | 500,000 and | 1,000,000. |
| 100 | " " of | \$1,000,000 and over. | |

IDAHO

There must be three or more incorporators, one of whom must be a resident of the state.

1. FIRST STEP

All the incorporators subscribe and acknowledge articles of incorporation, setting forth: (1) corporate name; (2) purpose; (3) place where principal business is to be transacted; (4) corporate duration, not to exceed fifty years; (5) number of directors or trustees; (6) amount of capital stock and the number of shares into which it is divided; (7) amount of capital stock actually subscribed and by whom; (8) classification of directors, if desired, into three classes, one class to be elected each year for three years.

2. SECOND STEP

The articles of incorporation are filed and recorded in the office of the Recorder of the county where the principal business is to be transacted.

3. THIRD STEP

A copy of the articles of incorporation, certified by the County recorder, must then be filed with the Secretary of State, who issues to the corporation a certificate showing that a copy of the articles containing the required statement of facts has been filed in his office.

COSTS

To the Secretary of State, 20 cents per folio for recording articles. Also, for filing same.

| | | | |
|------|---|---|-----------|
| \$10 | when the authorized capital stock does not exceed | . | \$25,000 |
| 20 | " " " " " " " " | . | 50,000 |
| 40 | " " " " " " " " | . | 100,000 |
| 60 | " " " " " " " " | . | 500,000 |
| 100 | " " " " " " " " | . | 1,000,000 |

150 when it exceeds \$1,000,000.

For issuing certificate of incorporation, \$3. To the County Recorder, for filing articles of incorporation, 50 cents; for recording same, 20 cents per folio, and 25 cents for certificate.

ILLINOIS

There must not be less than three or more than seven incorporators. No residential requirement is laid down.

1. FIRST STEP

All the incorporators sign and acknowledge a statement of incorporation, setting forth: (1) corporate name; (2) object; (3) amount of capital stock and the number of shares of which it shall consist; (4) location of principal office, giving town, street, and number; (5) duration of corporation, not exceeding ninety-nine years.

2. SECOND STEP

The statement of incorporation is then filed with the Secretary of State, who issues a license to the incorporators as commissioners to open books for subscription to capital stock, at such times and places as they may determine.

3. THIRD STEP

After the capital stock has been fully subscribed, the commissioners convene a meeting of all the subscribers, to elect directors

and transact any other necessary business. At least ten days' notice by mail must be given to each subscriber before the meeting.

4. FOURTH STEP

After holding the first meeting and completing their organization, the commissioners prepare a report of the proceedings of the first meeting setting forth: (1) the notice; (2) the names of the directors elected, with their respective terms of office; (3) a copy of the subscription lists; (4) the amount of capital, not less than half actually paid in; (5) the amount of capital not paid in; (6) what disposition has been made of the stock subscribed and not paid; (7) if any part of the stock has been paid in property, it shall be appraised by the commissioners at a fair cash value.

5. FIFTH STEP

This report, sworn to by a majority of the commissioners, and a statement setting forth the corporation's post office address, are filed with the Secretary of State, who issues a certificate of completed organization, which includes a copy of all the organization papers filed in his office, duly authenticated by him.

6. SIXTH STEP

This certificate of organization is then recorded in the office of the recorder of the county in which the company's principal office is to be located.

COSTS

To the Secretary of State for filing the articles of incorporation, \$1; for certificate with seal, \$1; for recording, 15 cents per 100 words; issuing license, \$1. Also an organization charge as follows: \$30 on capital stock not exceeding \$2,500; \$50 on capital stock between \$2,500 and \$5,000; \$1 for each additional \$1,000 over \$5,000. To the Recorder of Deeds, 10 cents per 100 words for recording, and 25 cents for certificate.

INDIANA

There must be three or more incorporators, but there is no residential requirement.

1. FIRST STEP

Articles of association must be signed and acknowledged in duplicate by the incorporators, specifying: (1) corporate name; (2) object; (3) amount of capital stock, number of shares and amount of each share which must not exceed \$100; (4) duration, not to

exceed fifty years; (5) number of directors, with names of those who shall manage the corporation for the first year; (6) name of city or town within the state where the principal place of business is to be located.

2. SECOND STEP

The articles of association are then presented to the Secretary of State, who upon approving same and receiving payment of the required fees, files them.

3. THIRD STEP

A duplicate of the articles of association, approved by the Secretary of State, is then filed in the office of the Recorder of the County where the principal place of business is to be located.

COSTS

To the Secretary of State, for filing articles of association, \$10 on capitalization of \$10,000 or less; $\frac{1}{16}$ of 1% on capitalization over \$10,000. For recording, \$1 for the first 200 words and 10 cents for each additional 100 words. Fifty cents for certificate. To the Recorder of Deeds for recording, \$1 for first 600 words and thereafter 10 cents per folio; certificate, 25 cents, with seal, 50 cents.

IOWA

One or more persons may incorporate. No residential requirements.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) the name of the corporation and its principal place of business; (2) the general nature of the business to be transacted; (3) the amount of capital stock authorized and the times and conditions on which it is to be paid in; (4) the time of the commencement and the termination of the corporation; (5) by what officers and persons its affairs are to be conducted, and the times when, and the manner in which, they will be elected; (6) the highest amount of indebtedness to which the concern is at any time to subject itself; (7) whether or not private property is to be exempt from corporate debts.

2. SECOND STEP

Before commencing any business except their own organization, the incorporators must have the articles of incorporation recorded in the office of the Recorder of Deeds of the county where the principal place of business is to be, in a book kept therefor, and the Recorder must, within five days thereafter, indorse thereon the

time when the same were filed and the book and pages where they are recorded. Said articles, thus indorsed, are then forwarded to the Secretary of State, who records them in a book kept for that purpose. Upon payment of the required fees, the Secretary of State issues a certificate of incorporation.

3. THIRD STEP

Within three months from the date the articles are filed in the office of the Secretary of State, notice of incorporation must be published once a week, for four weeks in succession, in some newspaper as convenient as practicable to the principal place of business, and must contain the seven items of information enumerated under the first step.

4. FOURTH STEP

Proof of publication, by affidavit of the publisher of the newspaper in which it is made, is filed with the Secretary of State.

COSTS

To the Secretary of State, for filing articles where authorized capital is \$10,000 or less, \$25, and \$1 for each \$1,000 of capital in excess of \$10,000. For recording articles, 10 cents per 100 words. For certificate, \$1. To Recorder of Deeds, for recording articles, 50 cents for first 100 words, and 10 cents for each 100 additional words.

KANSAS

Corporations may be created by the voluntary association five or more persons, three of whom must be citizens of Kansas.

1. FIRST STEP

Persons seeking to form a corporation make application to the State Charter Board, upon blank forms supplied by the Secretary of State. The application sets forth: (1) the name desired for the corporation; (2) the name of the post-office where the principal office or place of business is to be located; (3) the full nature and character of the business in which the corporation purposes to engage; (4) the names and addresses of the proposed incorporators; (5) the proposed amount of capital stock. Such statement shall be subscribed by all the proposed incorporators. The Charter Board makes a careful investigation of each application, and inquires especially regarding the character of the business in which the proposed corporation is to engage. If the Charter Board determines that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting

in good faith, the application is granted, and a certificate, setting forth that the application has been approved, is indorsed upon the application, and signed by the members of the Charter Board approving the same.

2. SECOND STEP

A charter must then be subscribed and acknowledged by at least five of the incorporators, setting forth: (1) the name of the corporation; (2) the purposes for which it is formed; (3) the place or places where its business is to be transacted; (4) the term for which it is to exist; (5) the number of its directors or trustees, and the names and residences of those who are appointed for the first year; (6) the amount of its capital, if any, and the number of shares into which it is divided; (7) the names and addresses of the stockholders, and the number of shares held by each. At least three of the subscribers must be citizens of Kansas.

3. THIRD STEP

The charter of every private corporation, after the payment of the fees provided for by law has been indorsed thereon by the Secretary of State, is filed in his office. The Secretary of State records the charter in a book kept for that purpose, and retains the original in his office, giving a certified copy of it to the incorporators. The president or the secretary file an affidavit with the Secretary of State, showing that not less than 20% of the capital stock has been paid.

COSTS

To the Charter Board an application fee of \$25. To the Secretary of State, at the time of filing the articles of incorporation, a charge based on the authorized capital as follows: $\frac{1}{10}$ of 1% on an authorized capital of \$100,000 or less. Minimum charge, \$10. On an authorized capital of more than \$100,000, \$100 plus $\frac{1}{10}$ of 1% on the amount of the capital in excess of \$100,000. For filing and recording charter, \$2.50.

KENTUCKY

Any number of persons, not less than three, may associate to establish a corporation. There is no residential requirement.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) name of the corporation; (2) name of the city or town and county, in which its principal office is to be located; (3) the nature of the business, or objects or purposes proposed to be transacted, promoted or carried on; (4) the amount of

its capital stock, if any, and the number of shares into which the same may be divided; (5) the names and places of residence of its stockholders and the number of shares subscribed by each; (6) the time when it is to commence and the period that it is to continue; (7) by what officers or persons the affairs of the corporation are to be conducted, and the time and place at which they are to be elected (8) the highest amount of indebtedness or liability which the corporation may at any time incur; (9) whether or not the private property of the stockholders, not subject to the provisions of the law under which it is organized, shall be liable for the payment of corporate debts, and if so, to what extent.

2. SECOND STEP

The articles are recorded in the County Clerk's office, of the county where the company's principal place of business is to be located, and a copy thereof is filed and recorded in the office of the Secretary of State, together with a statement that the organization tax has been paid to the State Treasurer.

COSTS

To the Secretary of State for recording, 25 cents per folio; for affixing seal of Commonwealth, \$2. To the State Treasurer, an organization tax of $\frac{1}{16}$ of 1% on the capital stock. To the County Clerk for recording, one cent for every ten words; certificate, 50 cents.

LOUISIANA

Three or more persons may organize a corporation. There is no residential requirement.

1. FIRST STEP

The incorporators sign and acknowledge before a notary the corporate charter, setting forth: (1) corporate name and place of domicile; (2) a description of the purposes for which the company is formed, the nature of the business to be carried on, and the name of the officer on whom process may be served; (3) the amount of capital stock, the number of shares thereof, the amount of each share and when and how payment for stock subscribed shall be made; (4) how the directors or managers shall be elected; (5) the method of liquidation at the termination of the charter, usually after ninety-nine years.

2. SECOND STEP

The charter of the corporation and the original subscription made for the purpose of organizing it are recorded in the office of the Recorder of Mortgages or other officer exercising his functions

at the place of the corporation's domicile, and is advertised in a newspaper published at its domicile once a week for thirty days.

3. THIRD STEP

A certified copy of the charter and a copy of one issue of the newspaper wherein the said charter has been advertised, together with the publisher's proof of publication, are filed in the office of the Secretary of State. The Secretary of State transcribes the copy of the charter in a book kept by him for that purpose.

COSTS

To the Secretary of State: for recording, 25 cents per folio; for certificate with seal, \$1. To the Recorder of Mortgages for recording, 25 cents per folio in the Parish of Orleans; in other parishes, 10 cents.

MAINE

There must be three or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators sign articles of agreement, setting forth the purposes of the corporation. They usually sign also a waiver of notice of the first meeting, fixing the time, the place, and the purposes thereof.

2. SECOND STEP

The incorporators meet at the time and place (in Maine) designated in the articles of agreement, or, if not designated therein, pursuant to a written waiver signed by all the incorporators, or otherwise by written notice signed by one or more of the incorporators, stating its purpose and served personally or by publication fourteen days before the time appointed for such meeting. At the meeting the directors organize the corporation.

3. THIRD STEP

Before beginning business, the president, the treasurer, and a majority of the directors sign and swear to a certificate of organization, setting forth: (1) name and purpose of corporation; (2) amount of capital stock; (3) amount already paid in; (4) par value of shares; (5) names and residences of the owners; (6) name of the county (in Maine) where the corporation is located; (7) number and names of the directors; (8) name and residence of the clerk.

4. FOURTH STEP

After the certificate of organization has been duly executed it is submitted to the Attorney General for approval, and, if in due form, is so certified by him.

5. FIFTH STEP

The certificate with the Attorney General's indorsement is then recorded in the registry of deeds, in the county where the corporation is located. A copy is certified by the Register of Deeds.

6. SIXTH STEP

The original certificate and the copy certified by the Register of Deeds is filed in the office of the Secretary of State within 60 days from the date of the first meeting. The Secretary of State indorses the date of filing on both certificates, records the certified copy and returns the original to the corporation. Corporate existence dates from the filing of the certificate in the Secretary of State's office.

COSTS

To the Secretary of State, for filing, \$5; certified copies, 12 cents a page; certificate, \$1. To the State Treasurer, organization tax, \$10 where the capital stock does not exceed \$10,000; \$50 where the capital stock does not exceed \$500,000; \$10 for each \$100,000 over \$500,000. To the Attorney General for examining and approving the certificate of organization, \$5. To the Recorder of Deeds for recording the certificate and giving a certified copy of same, \$5.

MARYLAND

There must be three or more adult incorporators, of whom one must be a citizen of the state.

1. FIRST STEP

The incorporators sign and acknowledge, before some officer competent to take acknowledgments of deeds for land situated in Maryland, a certificate of incorporation, setting forth: (1) the intention of the subscribers (giving their names and places of residence) to form a corporation; (2) the name of the proposed corporation; (3) the purpose or purposes for which it is formed, and the nature of its business or object; (4) the place where the company's principal Maryland office will be located; (5) the total amount of stock, if any, and the number and par value of the shares; and the restriction, if any, imposed upon the transfer of the shares; if the capital stock is to be classified, the certificate should show how much of said stock is to be preferred, and the preferences, voting powers, restrictions, and qualifications of the preferred stock; (6) the number of trustees, directors, or managers, not less than three; and the names of those who shall act as such for the first year, or until their successors are duly chosen and qualified; (7) any provisions which may be desired for the purpose of defining,

limiting, and regulating the powers of the corporation and of the directors and stockholders, or of any class of the stockholders.

2. SECOND STEP

The certificate is submitted to one of the judges of the judicial circuit in which the company's principal office will be located, who, if such certificate is executed in conformity with the law, certifies the fact thereon.

3. THIRD STEP

The certificate is then delivered to the State Tax Commissioner, who, upon payment of the recording fees, indorses thereon the date and time of receipt and records the same in a book kept by him for that purpose.

4. FOURTH STEP

Then the State Tax Commissioner transmits the original certificate, or a copy thereof duly certified by him, to the Clerk of the Circuit or Superior Court (according to the location of the company's principal office), by whom the same is again recorded.

5. FIFTH STEP

When such certificate has been executed and acknowledged in due form, and delivered to the State Tax Commissioner, with the recording fees and the bonus tax, if any is payable, the incorporators become a body corporate.

COSTS

To the State Treasurer, a bonus of $\frac{1}{8}$ of 1% on the authorized capital. To State Tax Commissioner for recording the charter, about \$5; for recording the bonus receipt, 50 cents.

MASSACHUSETTS

There must be three or more incorporators, natural persons over twenty-one years of age. There is no residential requirement.

1. FIRST STEP

The incorporators prepare an agreement of association, stating: (1) that the subscribers thereto associate with the intention of forming a corporation; (2) the corporate name assumed; (3) the city or town in Massachusetts where it is to be located; (4) the purpose for which it is formed; (5) the amount of its capital stock, and the par value and number of its shares; (6) any other provisions not inconsistent with law for the conduct and regulation of the corporation's business, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its direc-

tors or stockholders, or any class of stockholders; (7) the subscriber or subscribers by whom the first meeting shall be called; (8) the names and residences of the incorporators and the amount of stock subscribed by each.

2. SECOND STEP

The first meeting shall be called by a notice signed by the one designated in the certificate or by a majority of the subscribers to such agreement, stating the time, place, and purpose of the meeting, a copy of which notice shall, seven days at least before the day appointed for the meeting, be given to each subscriber, or left at his usual place of business or residence, or deposited at the post office, post paid, and addressed to him at his usual place of business or residence. One of those giving such notice shall make affidavit of his doings, which, with a copy of the notice, shall be recorded in the records of the corporation. All the incorporators may by writing waive notice of the time and place of such meeting. At such first meeting, or any necessary or reasonable adjournment thereof, an organization shall be effected by the choice by ballot of a temporary clerk, who shall be sworn, and by the adoption of by-laws and the election of directors, a treasurer, a clerk and such other officers as the by-laws may provide. At such first meeting no person shall be eligible as a director who has not subscribed the agreement of association. A temporary clerk shall make and attest a record of the proceedings until the clerk has been chosen and sworn, including a record of such choice and qualification.

3. THIRD STEP

A majority of the directors make, sign, and swear to a certificate setting forth a true copy of the agreement of association with the names of the subscribers thereto, the date of the first meeting and the successive adjournments thereof, the amount of capital stock then to be issued, the amount to be paid for in cash, and the part to be paid before the company commences business; if the stock is to be paid for in property or services, a description of the property and services; the name, residence, and post office address of each of the officers of the corporation. They submit such certificate and also the records of the corporation to the Commissioner of Corporations who examines the same, and who may require such other evidence as he deems necessary. If it appears that the requirements of the preceding sections preliminary to the establishment of the corporation have been complied with, the Commissioner so certifies and approves the certificate by his indorsement thereon.

4. FOURTH STEP

Such certificate is filed by said officers in the office of the Secretary of the Commonwealth, who, upon payment of the fee, causes

the same with the indorsement thereon to be recorded, and issues a certificate of incorporation. He also causes a record of such certificate to be made.

COSTS

To the Secretary of the Commonwealth for filing and recording the agreement of association and issuing a certificate of incorporation, $\frac{1}{10}$ of 1% of the total authorized capital stock. Minimum fee, \$25.

MICHIGAN

There must be three or more incorporators. No residential requirement is made.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) corporate name; (2) purposes; (3) principal place or places where the company's operations are to be carried on; (4) amount of authorized capital stock, not less than \$1,000 and not more than \$25,000,000. The amount subscribed must not be less than 50% of the authorized capital stock. Where common and preferred stock are provided for, an exact statement of the terms of issue, and the amount of each subscribed and paid in, must be included; (5) Number of shares into which the capital stock is divided, the par value to be either \$10 or \$100; (6) amount of capital stock paid in at the time of executing the articles, which shall be not less than 10% of the authorized capital and in no case less than \$1,000, except where the capitalization is \$2,000 or less, when it shall be 25% thereof; (7) the place in Michigan where the company's operations are to be carried on; (8) duration of company, not to exceed thirty years; (9) names of the stockholders, their respective residences, and the number of shares subscribed by each.

2. SECOND STEP

The president causes the articles of association to be recorded in the office of the Secretary of State. The Secretary of State then certifies upon the articles of association the time of receiving them for record and a reference to the book and page where they are recorded.

3. THIRD STEP

The articles of association are then filed and recorded in the office of the County Clerk of the county where the company's operations are to be carried on. The Clerk likewise certifies the time and place of recording same.

COSTS

To the Secretary of State for recording articles, 20 cents per folio; certified copies, 20 cents per folio; for attaching certificate, 25 cents; also franchise fee of 50 cents on each \$1,000 of authorized capital stock. Minimum fee, \$5. To the County Clerk, 20 cents per folio for recording.

MINNESOTA

There must be three or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators subscribe and acknowledge a certificate, specifying (1) the name, the general nature of the business of the proposed company and the principal place of transacting the same; (2) the period of its duration, if limited; (3) the names and places of residence of the incorporators; (4) in what board its management shall be vested, the date of the annual meeting at which it shall be elected, and the names and addresses of those composing the board until the first election; (5) the amount of capital stock, not less than \$10,000; how the same is to be paid in; the number of shares into which it is to be divided, and the par value of each share; and if there is to be more than one class, a description and the terms of issue of each and the method of voting thereon; (6) the highest amount of indebtedness or liability to which the corporation shall at any time be subject; (7) any other lawful provision defining and regulating the powers or business of the corporation, its officers, directors, trustees, members, and stockholders.

2. SECOND STEP

The certificate of every such corporation is filed for record with the Secretary of State, who, if he finds that it conforms to law, and that the required fee has been paid, records the same and certifies that fact thereon.

3. THIRD STEP

After such recording, the certificate is filed for record with the Register of Deeds of the county where the company will have its principal place of business.

4. FOURTH STEP

Every such certificate of incorporation is published in a qualified newspaper in the county of such principal place of business for two

successive days in a daily or for two successive weeks in a weekly newspaper. Upon filing with the Secretary of State proof of such publication, the corporate organization is complete.

COSTS

To the State Treasurer for filing articles of incorporation, \$50 for the first \$50,000 of capital stock or fraction thereof and \$5 for each additional \$10,000 or fraction thereof. To the Recorder of Deeds for recording and copies, 10 cents per folio. The publication of notice regarding the article of incorporation costs usually from \$10 to \$20.

MISSISSIPPI

There must be two or more incorporators. No requirement is made as to residence.

1. FIRST STEP

The incorporators sign and acknowledge an application for a charter setting forth: (1) corporate title; (2) names and post office addresses of the incorporators; (3) company's domicile; (4) amount of its capital stock; (5) par value of the shares; (6) period of existence, not to exceed fifty years; (7) purpose for which it is created.

2. SECOND STEP

The charter application is advertised three successive weeks in one or more newspapers of the county where the proposed corporation is to be domiciled.

3. THIRD STEP

The application is then forwarded to the Secretary of State together with the required fees. The Secretary of State indorses on the application the date of receipt of same and the amount of fees paid, and refers the application to the Attorney General for his approval.

4. FOURTH STEP

If the Attorney General approves the application he submits it to the Governor, who indorses his approval thereon and causes the Secretary of State to affix the great seal of the state.

5. FIFTH STEP

The approved charter is then recorded in the office of the Secretary of State and in the office of the Clerk of the Chancery Court of the county where the corporation is to carry on its business.

COSTS

To the Secretary of State for recording the charter, on capital stock not exceeding \$10,000, \$20; on capital stock between \$10,000 and \$30,000, \$40; on capital stock between \$30,000 and \$50,000, \$60; on capital stock over \$50,000, $\frac{1}{10}$ of 1%. Maximum fee, \$250. For a certified copy, \$10. The cost of publication is usually about \$10. To the Clerk of the Chancery Court, for recording charter and issuing certificate, 15 cents per 100 words, minimum fee, \$2.50.

MISSOURI

There must be three or more incorporators. They need not be residents of the state.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) corporate name; (2) name of the city or town and county where the corporation is to be located; (3) the amount of capital stock, the number of shares into which it is divided, and the par value thereof, together with a statement that the same has been *bona fide* subscribed, and that one half thereof has been actually paid in lawful money of the United States, and is in the custody of the persons named as the first board of directors or managers; (4) the names and places of residence of the several shareholders, and the number of shares subscribed by each; (5) the number of directors or managers, and the names of those agreed upon for the first year; (6) duration of the company, which shall in no case exceed fifty years; (7) purposes for which the company is formed.

2. SECOND STEP

The articles of agreement are recorded in the office of the Recorder of Deeds of the county and city in which the corporation is to be located.

3. THIRD STEP

A certified copy of such recorded articles of incorporation is filed in the office of the Secretary of State.

4. FOURTH STEP

The Secretary of State issues a certificate setting forth that the corporation has been duly organized, and specifying the amount of its capital, the period of its existence, and its permanent place of location.

COSTS

To the State Treasurer on filing articles, \$50 for the first \$50,000 of capital stock and \$5 for each additional \$10,000. To the Secretary of State, certificate of corporate existence, \$1.50; certified copies, \$1; recording, 10 cents per 100 words. To the Recorder of Deeds for recording, 8 cents per 100 words.

MONTANA

Corporations may be formed by the voluntary association of three or more persons.

1. FIRST STEP

Articles of incorporation are subscribed and acknowledged by the incorporators, setting forth: (1) corporate name; (2) purpose; (3) place where the company's principal business is to be transacted; (4) term, not to exceed forty years; (5) number of its directors or trustees, not to be less than three or more than thirteen, and the names and residences of those who are appointed for the first three months and until their successors are elected and qualified; (6) the amount of capital stock and the number of shares into which it is divided, and if there is to be more than one class of stock, a description of the different classes with the terms on which they are created; (7) amount of stock actually subscribed, and by whom; (8) if the stock is to be assessable, it must be so stated.

2. SECOND STEP

The articles of incorporation are then filed and recorded in the office of the Clerk of the county where the company's principal business is to be transacted.

3. THIRD STEP

A copy of the articles of incorporation, certified by the County Clerk, is filed and recorded in the office of the Secretary of State, who upon payment of the prescribed fees issues a certificate to the corporation.

COSTS

To the Secretary of State for recording and filing articles of incorporation:

| |
|--|
| 50 cents on each \$1,000 capital stock up to \$100,000 |
| 40 cents on each \$1,000 capital stock between \$100,000 and \$250,000 |
| 30 " " " " " " " " 250,000 and 500,000 |
| 20 " " " " " " " " 500,000 and 1,000,000 |
| 10 " " " " " " " " above \$1,000,000. |

Minimum fee, \$20. For copies, 20 cents per folio; certificate and seal, \$1; for issuing certificate of incorporation, \$3.

NEBRASKA

There may be any number of incorporators. No requirement is made as to residence.

1. FIRST STEP

Articles of incorporation are signed and acknowledged by the incorporators, setting forth: (1) corporate name; (2) location of principal business in the state; (3) general nature of business to be transacted; (4) amount of capital stock, time and conditions of payment, and amount of each share; (5) when corporate existence will begin and when it will end; the duration may be perpetual; (6) highest amount of indebtedness which may be incurred, not to exceed two thirds of the par value of the capital stock; (7) the officers by whom business is to be managed and the time of their election.

2. SECOND STEP

The articles of incorporation are then filed and recorded with the Secretary of State.

3. THIRD STEP

The articles of incorporation are then filed and recorded in the office of the County Clerk of the county where the principal office is located.

4. FOURTH STEP

Within four months after the articles are filed in the County Clerk's office, a notice must be published for four weeks in some newspaper near the principal place of business, containing virtually the same information as that given in the articles of incorporation.

COSTS

To the Secretary of State for filing articles of incorporation, \$10 on capitalization not exceeding \$10,000; \$20 on capitalization not exceeding \$25,000; \$50 on capitalization not exceeding \$100,000; 50 cents additional on each \$1,000 in excess of \$100,000. For recording articles of incorporation, 10 cents per folio of 100 words; certified copies, 10 cents per folio; certificate with seal, \$1. .

To the County Clerk for recording, 75 cents for the first two hundred words and one cent for each ten words thereafter; copies, 10 cents per folio; for certificate with seal, 25 cents.

NEVADA

Any number of persons, not less than three, may associate to establish a corporation.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) Corporate name; (2) Location of principal office or place of business in Nevada, giving the county, city, or town; (3) Nature of business to be carried on; (4) Amount of total authorized capital stock which shall not be less than \$2,000; the number of shares and the par value of each. The amount of subscribed capital stock with which the company will commence business, not less than \$1,000, the amount actually subscribed and the amount actually paid up, if any. If more than one class of stock is created, a description of each class, together with the terms on which it is created and the amount of each class subscribed and paid up; (5) Names of original subscribers to the capital stock and the amount subscribed by each; (6) Period of existence, which may be perpetual; (7) Designation of the members of its governing board as directors or trustees, and the number thereof, not to be less than three; (8) Whether or not full paid capital stock shall be subject to assessment for corporate debts.

2. SECOND STEP

The articles of incorporation are recorded in the office of the Clerk of the county where the principal place of business is to be located.

3. THIRD STEP

A copy of the articles of incorporation, certified under the hand of the County Clerk and the seal of said county, is then filed and recorded in the office of the Secretary of State.

4. FOURTH STEP

The Secretary of State then issues to the corporation a certificate that the articles of incorporation containing the required statement of facts have been filed in his office.

COSTS

The County Clerk's fees vary from 15 cents to 25 cents per folio for filing; 20 cents to 30 cents for recording, and 50 cents to \$1 for certificates. The Secretary of State's fees are 10 cents for each \$1,000 of authorized capital stock. Minimum fee, \$10. The Secretary's fee for the certificate is \$2.

NEW HAMPSHIRE

Five or more persons may associate to form a corporation.

1. FIRST STEP

The articles of association are signed by all the incorporators, setting forth: (1) corporate name; (2) object; (3) place in which business is to be carried on; (4) amount of capital stock, if any; (5) time of first meeting of the incorporators; (6) post office addresses of the incorporators.

2. SECOND STEP

The articles of agreement are recorded in the office of the Clerk of the town where the business of the corporation is to be carried on.

3. THIRD STEP

The articles of association are then recorded in the office of the Secretary of State.

COSTS

To the State Treasurer. Where a corporation is created to carry on business and have its principal office in New Hampshire, charter fees, \$50. Where a corporation is organized to carry on business and have its principal office outside of New Hampshire, the charter fees are as follows:

| | |
|---|------|
| If the authorized capital stock does not exceed \$25,000, | \$10 |
| " " " " " is between \$25,000 and \$100,000, 25 | |
| " " " " " 100,000 " 500,000, 50 | |
| " " " " " 500,000 " 1,000,000, 100 | |
| " " " " " exceeds . . . 1,000,000, 200 | |

To the Secretary of State for recording, 75 cents per page of 240 words; certificate and seal, 50 cents; to the Town Clerk for recording, 17 cents per page of 224 words.

NEW JERSEY

There must be three or more incorporators, who need not be residents of the state.

1. FIRST STEP

The incorporators, in the presence of a subscribing witness, sign, seal, and acknowledge a certificate of incorporation, setting forth: (1) name of corporation; (2) location of principal and subordinate offices within the state and name of agent in charge of the principal office upon whom process against the corporation may be served; (3) object or objects for which formed; (4) amount of capital stock

not less than \$2,000; and amount with which it will begin business, not less than \$1,000; number and par value of the shares; description of different classes of stock and terms of issue; (5) names and addresses of the incorporators and the number of shares subscribed by each; (6) period, if any, limited for duration; (7) any other provisions not inconsistent with law which the incorporators may choose to insert for the regulation of the business and for conducting the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class or classes of stockholders.

2. SECOND STEP

The certificate of incorporation and one copy thereof are taken to the office of the County Clerk, who compares the copy with the original. He then stamps the original as recorded, returns the original and records the copy.

3. THIRD STEP

The original certificate is then filed in the office of the Secretary of State, who, upon finding that it conforms with the law, files it and returns the copy, certified by him, to the incorporators. The incorporators, their successors and assigns, from the date of such filing constitute a body corporate.

COSTS

The County Clerk's fee for recording the certificate of incorporation is 25 cents per folio. The Secretary of State's fees are: for filing certificate of incorporation, 20 cents per \$1,000 of capital stock; minimum fee, \$25; recording, 10 cents per folio of one hundred words; minimum charge, \$1; certifying copy of charter, \$1.

NEW MEXICO

Upon executing, recording and filing a certificate of incorporation, three or more persons may become a corporation. There is no residential requirement.

1. FIRST STEP

The certificate of incorporation is signed and acknowledged, personally or by agent, by all the subscribers to the capital stock named therein. It sets forth: (1) name of the corporation; (2) the location (town or city, street and number, if number there be) of its principal office in this territory; also the name of the agent therein and in charge thereof, upon whom process against the cor-

poration may be served; (3) object or objects for which the corporation is formed; (4) the amount of the total authorized capital stock, which shall not be less than \$3,000, the number of shares into which the same is divided and the par value of each share; the amount of the capital stock with which the company will commence business, not less than \$2,000, and if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which they are created; (5) the names and post office addresses of the incorporators and the number of shares subscribed for by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business, and shall be at least \$2,000; (6) the period, if any, limited for the duration of the company; (7) the certificate of incorporation may also contain any provision, not inconsistent with law, which the incorporators may choose to insert for the regulation of the company's business, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class or classes of stockholders.

2. SECOND STEP

The certificate of incorporation is filed in the office of the Secretary of the Territory.

3. THIRD STEP

A copy thereof, duly certified by the Secretary of the Territory, is recorded in a book to be kept for that purpose in the office of the Recorder of the county where the principal office of such corporation in the territory shall be established. Upon making the certificate of incorporation and causing the same to be filed and recorded as aforesaid, the persons so associating, their successors and assigns, shall from the date of such filing constitute a body corporate.

COSTS

To the Territorial Secretary for filing a certificate of incorporation, 10 cents for each \$1,000 of the authorized capital stock. Minimum fee, \$25. For certified copies, \$1, and also 10 cents per 100 words. Filing proof of publication, \$5.

To the County Recorder for recording, 10 cents per folio; certificate and seal, \$1.

NEW YORK

There must be at least three incorporators, natural persons of full age. At least two thirds of them must be citizens of the United States, and at least one must be a resident of New York.

1. FIRST STEP

The incorporators sign and acknowledge in triplicate a certificate of incorporation, setting forth: (1) name of proposed corporation; (2) purpose; (3) amount of capital stock, and if any portion be preferred stock, the preferences thereof; (4) number of shares of which the capital stock shall consist, each of which shall not be less than \$5 or more than \$100, and the amount of capital, not less than \$500, with which the corporation shall begin business; (5) city, village or town in which its principal business office is to be located and, if in the City of New York, the borough therein where it is to be located; (6) duration; (7) number of directors, not less than three; (8) names and post office addresses of the directors for the first year, at least one of whom must be a resident of the state and all of whom must be stockholders, unless otherwise provided in the charter or by-laws; (9) names and addresses of the subscribers to the certificate and a statement of the number of shares of stock which each agrees to take; (10) any other provisions for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon the powers of its directors and stockholders which does not exempt them from any obligation or from the performance of any duty imposed by law.

2. SECOND STEP

The certificate of incorporation is then sent to the Secretary of State, together with the filing fee of \$10 and the recording fee of 15 cents for each 100 words. At the same time, the organization tax of one-twentieth of 1% on the total authorized capital must be sent to the State Treasurer, who issues duplicate receipts for the tax, forwarding one to the Secretary of State and the other to the person who paid the tax. The Secretary of State attaches the duplicate tax receipt to the certificate of incorporation in his possession, stamps thereon the amount and date of the payment of the tax, files, and records the certificate of incorporation, and notifies the person from whom he has received it of such filing.

3. THIRD STEP

As soon as the Secretary of State's notification of the filing and the State Treasurer's receipt for the organization tax are received, the duplicate original certificate of incorporation must be filed in the office of the Clerk of the County where the corporation has its principal office. The County Clerk's fee for filing is 6 cents, and for recording 10 cents, for each 100 words contained in the instrument. This completes the organization of the company.

COSTS

As above.

NORTH CAROLINA

There must be at least three incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators, or a majority of them, sign, seal, and acknowledge a certificate of incorporation, setting forth: (1) corporate name; (2) location of principal office in the state; (3) object or objects for which the corporation is formed; (4) amount of authorized capital stock; number of shares and par value of each; amount of capital stock with which it will commence business, and if there be more than one class of stock, a description of each class with the terms of its issue; (5) names and addresses of subscribers and the number of shares subscribed by each, the aggregate to be the amount of capital stock with which the company will commence business; (6) the period, if any, fixed for the duration of the corporation; where no time is so fixed, duration is limited to sixty years; (7) any other provisions which the incorporators may choose to insert not inconsistent with the laws of the state.

2. SECOND STEP

The certificate of incorporation is filed with the Secretary of State and recorded in the "Corporation Book."

3. THIRD STEP

A certified copy of the certificate of incorporation is then recorded with the Clerk of the Superior Court of the county where the principal office in the state is to be established, in a book known as the "Record of Incorporations."

COSTS

An organization tax of 20 cents on each \$1,000 of authorized capital stock must be paid to the State Treasurer; the minimum tax is \$25. The Secretary of State's fees for recording are \$1 for the first three copy sheets and 10 cents for each additional copy sheet. The recording fees of the Clerk of the Superior Court are \$3.

NORTH DAKOTA

Private corporations may be formed by the voluntary association of three or more persons. At least one third of the incorporators must be residents.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation setting forth: (1) corporate name; (2) purpose for which the company is formed; (3) place where its principal business is to be transacted; (4) term for which it is to exist, not exceeding twenty years; (5) the number of its directors or trustees and the names and residences of those who are to serve until their successors are elected and qualified; (6) if there is a capital stock, its amount, and the number of shares into which it is divided.

2. SECOND STEP

The articles of incorporation are then filed with the Secretary of State, who issues to the corporation a certificate showing that the articles containing the required statement of facts have been filed in his office. Thereupon the persons signing the articles, and their associates and successors, shall be a body corporate. Every corporation must file with the Secretary of State, at the time of filing the articles of incorporation, a duplicate receipt of the State Treasurer for the payment required to be made.

3. THIRD STEP

Upon the filing of articles of incorporation the Secretary of State records them in a book kept in his office for that purpose, called the "Book of Corporations," with the date of filing.

COSTS

To the Secretary of State for filing articles of incorporation, \$5; for recording and copies, 25 cents per folio; for certificate of corporate existence, \$3. To the State Treasurer, on filing articles, \$50 on a capital stock not exceeding \$50,000 and \$5 for each additional \$10,000 or fraction thereof.

OHIO

There must be five or more incorporators, a majority of whom must be citizens of the state.

1. FIRST STEP

The incorporators subscribe and acknowledge articles of incorporation, setting forth: (1) name of the corporation; (2) location of office and principal place of business within the state; (3) purpose for which formed; (4) amount of capital stock and number of shares; (5) amount of preferred stock, if any (not to exceed $\frac{1}{3}$ of paid-in capital), and of dividends on same (not to exceed 8%).

2. SECOND STEP

The official character of the officer taking the acknowledgment of the articles must be certified to by the Clerk of the Court of Common Pleas of the county where the acknowledgment is taken. The articles are then filed and recorded with the Secretary of State who issues a certified copy of the same. The corporate existence commences on the filing of the articles of incorporation with the Secretary of State.

COSTS

The Secretary of State charges \$10 for filing the articles of incorporation when the capital stock is \$10,000 or less; if over \$10,000, one-tenth of 1% of the authorized capital stock. Certificates under the great seal, \$1.

OKLAHOMA

There must be three or more incorporators, one third of whom must be residents of the state.

1. FIRST STEP

The incorporators sign and acknowledge articles of incorporation, setting forth: (1) name of corporation; (2) purpose; (3) place where the principal business is to be transacted; (4) duration, limited to twenty years for mining, manufacturing, and other industrial companies; other kinds of corporations may be perpetual; (5) number of directors or trustees; their qualifications and the names and residences of those who are to serve until the election of the board of directors; (6) amount of capital stock and number of shares thereof.

2. SECOND STEP

The articles of incorporation are then filed in the office of the Secretary of State, who issues a certificate that the articles have been filed and records them in the "Book of Corporations."

COSTS

To the Secretary of State for filing articles and issuing certificate of incorporation, $\frac{1}{10}$ of 1% of the authorized capital stock. Minimum fee, \$3. For affixing certificate of Secretary and seal of state, \$1. For recording, 25 cents per folio.

OREGON

Three or more persons may incorporate. There is no residential requirement.

1. FIRST STEP

The incorporators make, subscribe, and acknowledge in triplicate articles of incorporation, which specify: (1) corporate name; (2) duration of the corporation, if limited; (3) the enterprise in which the corporation is to engage; (4) the place where the corporation proposes to have its principal office or place of business; (5) amount of the capital stock; (6) amount of each share thereof.

2. SECOND STEP

The incorporators file one copy of such articles in the office of the Secretary of State, who records it in a book kept in his office for that purpose.

3. THIRD STEP

The incorporators file another copy with the Clerk of the county where the enterprise is to be carried on, or where the principal office or place of business is to be located. The Clerk records it in a book kept in his office. The third copy is retained in the possession of the corporation. The Secretary of State issues a certificate stating the facts contained in the articles, the date of filing and the fees paid.

COSTS

The following fees must be paid to the Secretary of State on filing articles of incorporation:

| | | |
|------|--------------------------------|-----------|
| \$10 | on capital stock not exceeding | \$5,000 |
| 15 | " " " " " " " " " " " " | 10,000 |
| 20 | " " " " " " " " " " " " | 25,000 |
| 25 | " " " " " " " " " " " " | 50,000 |
| 35 | " " " " " " " " " " " " | 100,000 |
| 45 | " " " " " " " " " " " " | 250,000 |
| 60 | " " " " " " " " " " " " | 500,000 |
| 75 | " " " " " " " " " " " " | 1,000,000 |

\$75 on each \$1,000,000 or fraction thereof in excess of \$1,000,000.

For certifying and affixing state seal, \$2; for copies, 25 cents per folio. County clerk's fees for recording, 10 to 20 cents per folio; 25 cents for certificates.

PENNSYLVANIA

There must be three or more incorporators, one of whom must be a citizen of the state.

1. FIRST STEP

At least two of the incorporators, one of whom must be a citizen of the state, subscribe, acknowledge, and verify a certificate of incorporation setting forth: (1) corporate name; (2) purposes; (3) place or places where business is to be transacted; (4) duration; (5) names and residences of the subscribers and number of shares subscribed by each; (6) number of directors, and names and residences of those chosen for the first year; (7) amount of capital stock and the number and par value of the shares into which it is divided; (8) a statement that 10% of the capital stock has been paid in (in cash) to the treasurer of the corporation whose name and residence must be given.

2. SECOND STEP

Notice of intention to apply for a charter must be inserted for three weeks in two newspapers of general circulation, printed in the county where the business of the corporation is to be carried on. This notice must set forth the names of at least three of the incorporators, the Act of Assembly under which the application is to be made, the purpose for which the company is to be formed, and the time when application will be made to the Governor for a charter.

3. THIRD STEP

During the period of publication the certificate should be on file with the Secretary of State.

4. FOURTH STEP

Upon the completion of the publication, the certificate of incorporation, together with due proof of publication of notice, is presented to the Governor, who, if the application is in proper form, endorses his approval thereon and grants letters patent.

5. FIFTH STEP

The certificate is then recorded in the office of the Secretary of the Commonwealth and returned to the incorporators.

6. SIXTH STEP

The certificate so endorsed by the Governor must be recorded in the office of the Recorder of Deeds of the county where the Company's principal operations are to be carried on.

COSTS

To the Secretary of the Commonwealth, a charter fee of \$30.

To the Recorder of Deeds for recording, 25 cents per folio.

To the State Treasurer, a bonus fee of $\frac{1}{3}$ of 1% on the authorized capital stock.

The cost of publication varies from \$7 to \$20.

PHILIPPINE ISLANDS

1. FIRST STEP

Five or more persons, not exceeding fifteen, a majority of whom are residents of the Philippine Islands, may form a private corporation for any lawful purpose by filing with the Division of Archives, Patents, Copyrights and Trade-Marks of the Executive Bureau articles of incorporation duly executed and acknowledged before a notary public, setting forth: (1) Name of the corporation, (2) Purpose for which it is formed. (3) Place where the principal office is to be established, which place must be within the Philippine Islands, (4) Term for which it is to exist, not exceeding fifty years, (5) Names and residences of the incorporators. (6) Number of directors, not less than five or more than eleven. The directors named in the articles of incorporation shall be the directors until their successors are elected and qualified as provided by the by-laws. (7) If it is a stock corporation, the amount of its capital stock, in Philippine currency, and the number of shares into which it is divided. (8) If it is a stock corporation, the amount of capital stock actually subscribed, the names and residences of the persons subscribing, the amount subscribed by each, and the sum paid by each on his subscription. The articles of incorporation of any stock corporation shall not be filed, unless accompanied by a sworn statement of a treasurer elected by the subscribers showing that at least 25% of the entire capital stock has been subscribed, and that at least 25% of the subscription has been paid to him for the benefit and to the credit of the corporation. (9) Sum paid in by each subscriber. (10) Name of treasurer elected by the subscribers to serve until his successor is elected.

2. SECOND STEP

The Chief of the Division of Archives, Patents, Copyrights and Trade-Marks of the Executive Bureau, on the filing of the articles of incorporation, issues to the incorporators a certificate, setting forth that such articles of incorporation have been duly filed in his office in accordance with law; and thereupon the per-

sons signing the articles of incorporation, and their associates and successors, constitute a body corporate.

COSTS

To the Chief of the Division of Archives, for filing articles of incorporation, 25 pesos (\$12.50).

PORTO RICO

Three or more persons of full legal capacity may organize a corporation. There is no residential requirement.

1. FIRST STEP

The articles of incorporation must be subscribed by each of the incorporators, and must be acknowledged before a notary or other officer authorized to take and certify acknowledgments. They shall set forth: (1) name of the corporation; (2) location, including town or city, street and number, if there be any, of its principal office in the Island of Porto Rico; (3) period, if any, limited for the duration of the corporation; (4) object or objects for which the corporation is formed; (5) the amount of the total authorized capital stock of the corporation, which shall not be less than \$2,000, the number of shares into which the same is divided, and the par value of each share, the amount of paid-in capital with which it shall commence business, which shall not be less than \$1,000; (6) names and post office addresses of the incorporators, the number of shares subscribed by each and the amount of their subscriptions paid in by each; (7) any provision consistent with law which the incorporators may choose to insert for the regulation of the business and the conduct of the affairs of the corporation or for creating, defining, limiting, and regulating the powers of the directors, or of the stockholders.

2. SECOND STEP

The articles of incorporation shall be filed in the office of the Secretary of Porto Rico. Upon payment of the filing fees provided by law, and upon the issue by the Secretary of Porto Rico, of his certificate that the said articles containing the statements required by the foregoing section have been filed in his office, the existence of the corporation shall begin, and from and after the date of such filing it shall constitute a body corporate. Before business is begun a copy of the certificate must be filed with the treasurer of Porto Rico.

COSTS

To the Secretary of Porto Rico, for filing articles, 15 cents for each \$1,000 of capital stock. Minimum fee, \$25; maximum, \$500.

For issuing certificate of corporate existence, \$3; recording articles and copies thereof, 20 cents per folio; affixing certificate and seal of island, \$1.

RHODE ISLAND

Any three or more persons of lawful age may form a corporation. There is no residential requirement.

1. FIRST STEP

Their written articles, signed and acknowledged, shall express: (1) their agreement to constitute an ordinary business corporation; (2) the name by which it shall be known; (3) the business for which it is formed; (4) the town or city where it is located; (5) the amount of capital stock and whether common or preferred and how much of each, and the par value of each share, and, if preferred, the advantage held by the preferred over the common. The residences of the incorporators must also appear.

2. SECOND STEP

The incorporators file the articles of agreement in the office of the Secretary of State, together with the certificate of the General Treasurer that said incorporators have paid the amounts due him.

3. THIRD STEP

The Secretary of State issues to the corporation his certificate of incorporation. Then the incorporators, their associates, successors, and assigns are authorized to transact business as a corporation.

COSTS

To the Secretary of State for issuing certificate, \$1.

To the State Treasurer, \$100 if capital stock be \$100,000 or less; if over \$100,000, $\frac{1}{10}$ of 1%.

SOUTH CAROLINA

There must be two or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators file with the Secretary of State a written declaration of incorporation, setting forth: (1) names and residences of petitioners; (2) name of proposed corporation; (3) place where it proposes to have its principal place of business, or to be located; (4) general nature of business it proposes to do; (5) amount of capital stock, and how and when payable; (6) number

of shares into which the capital stock is to be divided and par value, if such there be, of each share; (7) any other matter which it may be desirable to set forth.

2. SECOND STEP

The incorporators file the declaration with the Secretary of State, who issues to the parties a commission constituting them a Board of Corporators and, where there is to be capital stock, authorizing them to open books of subscription to the capital stock of the proposed corporation after such public notice, not exceeding ten days, as he may require in the said commission.

3. THIRD STEP

The Board of Corporators open the books of subscription to the capital stock, and when 50% or more has been subscribed, a meeting is called by the Board of Corporators. At this meeting the subscribers vote for the Board of Directors from among themselves. Then the Board of Directors elect from their number a president, a secretary, and a treasurer, and call for the payment of subscriptions to the capital stock.

4. FOURTH STEP

Upon payment to the company's treasurer, or to some other officer designated for the purpose by the subscribers, of at least 20% of the aggregate amount of the capital subscribed payable in money, and also upon the delivery to such officer of at least 20% of the property subscribed to the capital stock, or upon its delivery being secured as the board of directors may approve, the Board of Corporators, or a majority of them, certify to the Secretary of State that the above-mentioned requirements have been complied with. This certificate must contain a report of the first meetings with the names of directors and officers elected.

5. FIFTH STEP

Upon the filing of the certificate and the receipt for the charter fee hereinafter provided for, the Secretary of State issues to the Board of Corporators a certificate to be known as the charter. A copy of this charter is recorded in the office of the Register of Mesne Conveyance, or Clerk, for each county where the corporation shall have a business place. Upon the issuance of the charter by the Secretary of State, the Board of Corporators turns over to the proper officers of the corporation all subscription lists or other papers they have taken as corporators.

Costs

To the Secretary of State, charter fee of \$1 on each \$1,000 capital up to and including \$100,000; on each \$1,000 of capital over \$100,000 and up to \$1,000,000, 50 cents; on each \$1,000 in excess of \$1,000,000, 25 cents.

For recording each declaration, petition, or return precedent to granting the charter, \$2.50; for issuing charter, \$5.

SOUTH DAKOTA

There must be three or more incorporators, one of whom must be a resident of the state.

FIRST STEP

The incorporators subscribe and acknowledge articles of incorporation, setting forth: (1) corporate name; (2) corporate purpose; (3) place where principal business within the state is to be transacted; (4) duration, not to exceed 25 years; (5) number of directors or trustees, and names and residences of those who are to serve until the election of the officers and their qualification; (6) amount of capital stock and number of shares thereof. An affidavit made by two of the incorporators is attached to the articles of incorporation, averring that the company is organized in good faith and not to avoid the law against trusts and monopolies.

2. SECOND STEP

The articles are filed with the Secretary of State, who, if all fees are paid, issues a certificate showing that the articles have been duly filed. Thereupon the persons signing the articles, their associates and successors shall constitute a body corporate.

Costs

To be paid the Secretary of State for examining, filing, and recording articles of incorporation and issuing the charter: \$10 on authorized capital of less than \$25,000; \$15 on authorized capital between \$25,000 and \$100,000; \$20 on authorized capital between \$100,000 and \$500,000; \$20 for the first \$500,000 and \$10 for each additional \$500,000, or any part thereof, up to \$5,000,000; \$150 over \$5,000,000. For any excess over 1,000 words in the articles of incorporation, an additional recording fee of 10 cents per folio; copies, 25 cents per folio, and certificate with seal, \$1.

TENNESSEE

There must be five or more incorporators over 21 years of age.

1. FIRST STEP

The incorporators sign and acknowledge a charter of incorporation setting forth: (1) Names of incorporators; (2) name of corporation; (3) purposes of corporation; (4) amount of capital stock; (5) corporate powers; (6) scope of by-laws; (7) number, powers, and proceedings of board of directors; (8) corporate books; (9) assessments on stock; (10) amendments and dissolution; (11) annual reports; (12) liabilities of officers, directors, and stockholders.

2. SECOND STEP

The charter is then registered in the office of the Register of the county where the principal place of business is to be established.

3. THIRD STEP

The charter is next registered in the office of the Secretary of State, who issues a certificate of registration.

4. FOURTH STEP

The charter, with the Secretary of State's certificate, is then also registered in the office of the Register of the county where the corporation is to do business. This completes the incorporation.

COSTS

To the Secretary of State: $\frac{1}{16}$ of 1% on the authorized capital stock and a registration fee of \$10; certified copy of charter, \$10; to Register, \$3.

TEXAS

There must be three or more incorporators, two of whom must be citizens of the state.

1. FIRST STEP

The incorporators subscribe and acknowledge a charter, setting forth: (1) name of the corporation; (2) purpose for which it is formed; (3) place or places where its business is to be transacted; (4) term for which it is to exist, not to exceed fifty years; if no term is limited in the charter, the duration of the company is twenty years; (5) the number of its directors or trustees and the names and

residences of those who are appointees for the first year; (6) the amount of its capital stock, if any, and the number of shares into which it is divided.

2. SECOND STEP

The charter is thereupon filed in the office of the Secretary of State, who records it in a book kept for that purpose, retaining the original on file in his office.

3. THIRD STEP

The stockholders of a private corporation created for profit with a capital stock must subscribe the full amount of its authorized capital stock, and pay fifty per cent thereof before the corporation is chartered. Whenever the stockholders of any such company furnish satisfactory evidence to the Secretary of State that the full amount of the authorized capital stock has in good faith been subscribed, and fifty per cent thereof paid in cash, or its actual honest equivalent in other property or in labor done, it shall be the duty of said officer, on payment of office fees and franchise tax due, to receive, file, and record the charter of such company in his office, and to give his certificate showing the record thereof. Satisfactory evidence as above mentioned shall consist of the affidavit of those who executed the charter stating (1) the name, residence, and post office address of each subscriber to the capital stock of such company; (2) the amount subscribed by each and the amount paid by each; (3) the cash value of any property received, giving its description, location, and from whom and the price at which it was received; (4) the amount, character, and value of labor done, from whom and the price at which it was received; provided, that if the Secretary of State is not satisfied he may, at the expense of the incorporators, require other and more satisfactory evidence before he shall be required to receive, file, and record said charter.

Costs

To the Secretary of State for filing charter, \$50 on capital stock not exceeding \$10,000; \$10 for each additional \$10,000 or part thereof. For copying, 15 cents per folio; for each official certificate, \$1. Also a proportional part of one year's franchise tax to the following first day of May must be paid. The annual franchise tax is as follows: 50 cents on each \$1,000 or part thereof of the authorized capital stock. If the outstanding and issued stock, plus surplus and undivided profits, exceeds the authorized capital stock, 50 cents on each \$1,000 issued and outstanding, plus surplus and undivided profits. If the authorized capital exceeds \$1,000,000 the annual franchise tax is 50 cents for each \$1,000 up to \$1,000,000;

25 cents for each \$1,000 in excess of \$1,000,000. Minimum franchise tax, \$10.

UTAH

Private corporations may be formed by any number of incorporators, not less than five. One of them must be a resident of the state.

1. FIRST STEP

The incorporators enter into written articles of agreement, signed by each of them and sworn to by at least three of their number, stating: (1) name of the corporation; (2) the precinct or city where it is organized; (3) names of the incorporators and their places of residence; (4) time of the company's duration, which shall not in any case be less than three or more than one hundred years; (5) the pursuit of business agreed upon; (6) the place of business; (7) the amount of stock each party has subscribed; (8) the amount of each share, and the limit of capitalization; (9) the number and kinds of officers; their qualifications and term of office; time and manner of their election, removal, and resignation; names of officers to serve until the first general election; the number of directors shall not be less than three or more than twenty-five; (10) number of directors necessary to form a quorum, which must not be less than one fourth of the entire number; (11) whether or not the private property of the stockholders shall be liable for its obligations; (12) such additional clauses as the incorporators deem necessary for conducting the business of the corporation and for its future safety and welfare.

2. SECOND STEP

Three or more of the incorporators make affidavit to the effect that they have commenced, or that it is *bona fide* their intention to commence and carry on, the business mentioned in the agreement, and that the affiants verily believe that each party to the agreement has paid or is able to and will pay the amount of the stock subscribed by him; provided that said affidavit shall not be made until at least ten per cent of the stock subscribed by each stockholder and not less than ten per cent of the capital stock of the corporation has been paid in.

3. THIRD STEP

Within ten days after its execution, the agreement, affidavit of incorporators, and oaths of officers named to serve until the first election must be filed and recorded in the office of the Clerk of the county where the business is to be carried on, who thereupon issues a certificate of such filing. This, together with a copy of the agree-

ment, affidavits, and oaths, is filed with the Secretary of State, who thereupon issues a certificate of incorporation.

COSTS

Fees of Secretary of State. For a copy of any law, resolution, record, or other document, or paper on file in his office, 15 cents per folio. For affixing certificate and seal of state, \$1. For receiving and filing each original or certified copy of articles of incorporation, 25 cents on each \$1,000 of capital stock of the corporation. For issuing each certificate of incorporation, \$5. Fees of County Clerk. For filing and indexing articles of incorporation, \$2.50. For filing and indexing amendments to articles of incorporation, \$1.50. For recording, 20 cents per folio. For approving and filing bonds and oaths of officers, 50 cents for each instrument.

VERMONT

Five or more persons of age may, by articles of association, form a corporation for carrying on any object or business not repugnant to public policy or the laws of Vermont, but if in the opinion of the Secretary of State the business of a proposed corporation may be repugnant to public policy or the laws of Vermont, he shall, before making the record hereinafter provided, refer the same to a judge of the supreme court, who shall have full power to determine, with or without hearing, whether such proposed corporation may or may not be organized.

1. FIRST STEP

The incorporators sign articles of association, setting forth: (1) name of the corporation; (2) object or objects for which it is established; (3) place where its business is to be carried on; (4) amount of its capital stock, if any; (5) post office addresses of the incorporators.

2. SECOND STEP

The articles of association are transmitted to the Secretary of State who, if the same are properly executed, records them in a book kept for that purpose and returns to the corporators a certified copy thereof.

3. THIRD STEP

Such copy is recorded in the office of the Clerk of the town where the corporation's principal place of business is to be located. When the original articles and the certified copy are so recorded, and the franchise or license tax required by law, if any, has been paid to the state treasurer, the signers become a corporation.

COSTS

| | | | |
|--|------------------|--------------------|-----------------------|
| To the Secretary of State, organization bonus, | | | |
| \$10 | on capital stock | not exceeding..... | \$5,000 |
| 25 | " | " between.. | \$5,000 and 10,000 |
| 50 | " | " .. | 10,000 and 50,000 |
| 100 | " | " .. | 50,000 and 200,000 |
| 200 | " | " .. | 200,000 and 500,000 |
| 300 | " | " .. | 500,000 and 1,000,000 |
| 500 | " | " exceeding | 1,000,000. |

For a certified copy and record of articles, \$2. To the State Treasurer a proportionate amount of the first year's annual license tax which is as follows: \$10 on the first \$50,000 or less of the capital and \$5 on each additional \$50,000. Maximum license tax, \$50.

VIRGINIA

Any number of persons, not less than three, may associate to establish a corporation. There is no residential requirement.

1. FIRST STEP

The incorporators sign and acknowledge a certificate of incorporation, setting forth: (1) name of the corporation; (2) name of the county, city, or town wherein its principal Virginia office is to be located; (3) purposes for which it is formed; (4) maximum and minimum amount of the capital stock of the corporation, and its division into shares; and if there be more than one class of stock created by the certificate of incorporation, a description of the different classes thereof, with the terms on which such different classes are created; (5) period, if any, limited for the duration of the corporation; (6) names and residences of the officers and directors who, unless sooner changed by the stockholders, are for the first year to manage the corporation's affairs; (7) amount of real estate to which its holdings at any time are to be limited; (8) any provision which the incorporators may choose to insert for the regulation of the business, and for the conduct of the company's affairs; and any provision creating, defining, limiting or regulating the powers of the corporation, of the directors, or of the stockholders, of any class or classes of stockholders, provided such provision be not inconsistent with law.

2. SECOND STEP

Such certificate shall be presented to the judge of the circuit court of the county, or of the circuit, corporation, or chancery court

of the city where the corporation's principal office is to be located. Such judge shall thereupon certify thereon whether or not, in his opinion, such certificate is signed and acknowledged in accordance with the requirements of law, and if not, in what respects it is faulty.

3. THIRD STEP

As soon as the certificate is so indorsed by the judge, and the fee and tax, if any, required by law to be paid to the state have been duly paid, the certificate, together with the receipt for such payment, and separate certified checks or bank drafts, postal note or money order, one payable to the Secretary of the Commonwealth and one payable to the clerk of the proper court for the amounts of the proper fees for recording such charter, may be presented to the State Corporation Commission, which ascertains whether or not the applicants have, by complying with the requirements of law, entitled themselves to the charter, and issues or refuses the same accordingly.

4. FOURTH STEP

When so issued, the certificate with all endorsements, together with the order thereon of the State Corporation Commission, is certified by the said Commission to the Secretary of the Commonwealth, who records it in the charter records of his office.

5. FIFTH STEP

The Secretary of the Commonwealth thereupon certifies the same to the clerk of the circuit court of the county, or to the corporation court of the city, wherein the principal office of such corporation is to be located, or to the clerk of the chancery court of the city of Richmond, when such principal office is to be located in said city, who likewise records the same in a book kept for the purpose in his office. The fact of such recording is endorsed upon the said certificate, and the said certificate, with all endorsements thereon, is returned by the said clerk to the State Corporation Commission and lodged and preserved in the office of its clerk. As soon as the charter shall have been lodged for recording in the office of the Secretary of the Commonwealth, the persons who signed and acknowledged the certificate and their successors become a body corporate.

Costs

To the State Treasurer, charter fee as follows: Where authorized capital is \$50,000 or less, \$10; where authorized capital is between \$50,000 and \$1,000,000, 20 cents for each \$1,000; over \$1,000,000, \$600.

For recording and certifying the application certificate, a minimum fee of \$3 for two pages; each additional page, 50 cents.

The same recording charges are made by the clerk of the county court.

WASHINGTON

There must be two or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators subscribe and acknowledge articles of incorporation in triplicate, setting forth: (1) name of corporation; (2) object; (3) amount of capital stock; (4) duration, not to exceed fifty years; (5) number of shares into which the capital stock is divided; (6) number and names of trustees to manage the corporate affairs for such time, not less than two, or more than six, months, as the certificate may designate; of whom one must be a resident of the state; (7) name of city and county where the principal place of business is to be located.

2. SECOND STEP

One copy of the articles of incorporation is filed and recorded in the office of the Secretary of State.

3. THIRD STEP

A second copy of the articles of incorporation is filed and recorded in the office of the Auditor of the county where the principal place of business is to be located. Within thirty days after filing articles of incorporation with the county Auditor, the corporation must also file a statement, sworn to by its president and attested by its secretary under the corporate seal, containing a list of its officers with their respective names, titles, addresses, and terms of office. Corporate existence begins upon the payment of fees and the filing of articles of incorporation.

COSTS

To the Secretary of State: filing fee, \$25; recording fee, 15 cents for each folio in excess of 20 folios; for certified copy of articles, \$5, and 15 cents extra for each folio over twenty; for certificates under seal of state, \$2. To the County Auditor, filing, 10 cents; indexing, 5 cents for first two names and 5 cents for each additional name; certified copy 10 cents per folio; recording, 15 cents per folio and 50 cents for certificate and seal.

WEST VIRGINIA

There must be five or more incorporators, each of whom must have paid in 10% of his subscription to the capital stock before the agreement of incorporation may be filed with the Secretary of State. There is no residential requirement.

1. FIRST STEP

The incorporators sign and acknowledge an agreement of incorporation, setting forth: (1) corporate name; (2) location of principal office or place of business, giving the name of the city or town, street number, county and state, territory or country; (3) object; (4) the amount of total authorized capital stock, with the number of shares into which it is divided and the par value thereof, the amount subscribed and the amount paid in: if there be more than one class of stock, a description of each class with the terms of its issue; (5) the names and post office addresses of the incorporators and the number of shares subscribed by each; (6) duration, not to exceed 50 years; (7) any provisions for the regulation of the business and for the conduct of the affairs of the corporation.

2. SECOND STEP

The agreement is then filed with the Secretary of State, who upon payment of his fees and the license fees for the first year issues a certificate of incorporation.

3. THIRD STEP

Three months thereafter the incorporators file the certificate of incorporation or a certified copy thereof with the Clerk of the county where the principal office is to be located. Corporate existence commences on the issuing of a certificate of incorporation by the Secretary of State.

COSTS

To the Secretary of State: For filing agreement of incorporation and issuing charter, \$10; for certified copy of charter to be filed in Clerk's office, \$10; to County Clerk for filing and recording charter, \$2.50, and 3 cents extra for each 30 words in excess of 400 words. Part or all of the annual license tax for the first year must also be paid. This varies in accordance with the amount of the company's capital and the time when the articles are filed.

WISCONSIN

There must be three or more adult incorporators, residents of the state.

1. FIRST STEP

The articles of incorporation are signed and acknowledged by the incorporators and contain: (1) corporate purposes; (2) name of the corporation and location of its office within the state; (3)

capital stock, number of shares, and par value thereof; (4) designation of general officers and number of directors, who must not be less than three; (5) principal duties of the general officers; (6) method by and conditions on which members shall be accepted, discharged or expelled; (7) any other provisions consistent with law.

2. SECOND STEP

The original articles of incorporation, or a true copy thereof verified as such by the affidavits of two of the signers, is filed with the Secretary of State.

3. THIRD STEP

A certified copy of the articles of incorporation, with the certificate of the Secretary of State showing date of filing in his office, must be recorded within thirty days in the office of the Register of Deeds of the county where the corporation is located.

4. FOURTH STEP

The Register then transmits to the Secretary of State a certificate of the date of recording the articles, and the latter thereupon issues a certificate of incorporation. Corporate existence commences upon recording the articles of incorporation by the Register of Deeds.

COSTS

To the Secretary of State: Filing articles of incorporation, \$25 on capitalization of \$25,000 or less, and \$1 for each additional \$1,000 of capital; to the Register of Deeds, from 5 cents to 20 cents per folio for recording and copying; Register's certificate, 25 cents.

WYOMING

There must be three or more incorporators. There is no residential requirement.

1. FIRST STEP

The incorporators sign and acknowledge a certificate of incorporation in duplicate, setting forth: (1) name; (2) object; (3) amount of capital stock; (4) duration, not to exceed fifty years; (5) number of shares of which the stock shall consist; (6) number of directors, not less than three, and the names of those who shall manage the affairs of the company for the first year; (7) name of town and county where the principal office shall be located and where the operations of the company shall be carried on.

2. SECOND STEP

One certificate is filed in the office of the Secretary of State. A certificate must also be filed with the Secretary of State within ninety days thereafter, designating the location of the principal office in the state and the agent in charge thereof upon whom service may be made, together with an acceptance of the state constitution.

3. THIRD STEP

A copy of the certificate of incorporation is filed and recorded in the office of the Clerk of each county where the company's business is to be carried on.

4. FOURTH STEP

Within thirty days after the filing of the certificate of incorporation with the Secretary of State, a notice of incorporation must be published three times in a newspaper of general circulation in Wyoming. This notice must contain the points of information above specified. Proof of such publication must be filed with the Secretary of State within the said thirty days.

COSTS

To the Secretary of State: on filing certificate of incorporation, \$5, where capital stock does not exceed \$5,000; \$10 on capital stock between \$5,000 and \$100,000; on capital stock in excess of \$100,000, \$10 and 5 cents extra for each additional \$1,000 in excess of \$100,000; \$1, certificate and seal; \$1, filing proof of publication.

To the County Clerk, recording fees: 50 cents for the first 100 words and 10 cents a folio for excess; for copies, 15 cents per folio; certificate and seal 50 cents. For publication of notice of incorporation, \$5 for the three notices.

APPENDIX B .

(See Chapter XXVIII)

THE following paragraphs state briefly the fines and penalties imposed upon and the disabilities incurred in each of the states by a foreign corporation which transacts business without complying with the local laws:

ALABAMA

A foreign corporation's failure to comply with the law invalidates all its contracts made within the state. For each offense, the corporation is liable to a fine of \$1,000, and its agents are liable to a fine of \$500.

ALASKA

If any corporation shall attempt or commence to do business in Alaska without having first filed the statements, certificates, and consents required, it shall forfeit the sum of \$25 for every day it shall so neglect to file the same. Every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto.

ARIZONA

Every act done by a foreign corporation before complying with the laws shall be utterly void.

ARKANSAS

A fine of \$1,000 is imposed for each day's default. Besides, the penalty of inability to enforce contracts made in Arkansas is laid on an offending corporation. Complying with the requirements of law after suit is brought on a contract does not validate the contract.

CALIFORNIA

Fine of \$500. Inability to sue.

COLORADO

A delinquent company's agents, officers, and stockholders are jointly and severally liable on all contracts made by the corporation during the time it neglects to comply with the law.

CONNECTICUT

A delinquent company's officers and agents are subject to a fine of \$1,000, but the validity of its contracts is not affected.

DELAWARE

A delinquent corporation is liable to a fine of not less than \$200, or more than \$500, for each offense. Its agents are liable to a fine of not less than \$100, or more than \$500, for each offense.

DISTRICT OF COLUMBIA

No statutory requirements.

FLORIDA

A delinquent corporation is liable to a fine of not more than \$1,000 for the first offense, and not more than \$5,000 for each subsequent offense. Its agents and officers are liable to a fine of not more than \$2,000, or imprisonment not exceeding six months, or both. Its contracts cannot be enforced by the corporation, but are enforceable against it.

GEORGIA

An attempt to exercise corporate powers and privileges which are not permitted by the Georgia laws or public policy is invalid and may be enjoined by a suit brought by a party in interest or by the Attorney General.

IDAHO

A delinquent corporation's contracts are unenforceable, and while in default it may not acquire or hold realty. Its agents and officers are jointly and severally liable on its contracts.

ILLINOIS

A delinquent corporation is liable to a fine of not less than \$1,000, or more than \$10,000. Its contracts are invalid even though after making them it complies with the law.

IOWA

A delinquent corporation is liable to a fine of \$100 for each day's default. Its agent, employee, or officer is liable to \$100 fine, or thirty days' imprisonment, or both, and all the costs of prosecution.

KANSAS

Foreign corporations are subject to the same provisions, judicial control, restrictions, and penalties as domestic concerns.

KENTUCKY

A delinquent corporation and its agents are severally liable to a fine of not less than \$100, and not more than \$1,000, for each offense.

LOUISIANA

Foreign corporations not appointing a resident agent may be validly sued by service of process on the Secretary of State.

MAINE

No penalty for doing business without authority.

MARYLAND

A delinquent corporation cannot sue until the laws shall have been complied with. Its agent is liable to a fine of \$200.

MASSACHUSETTS

A delinquent corporation and its agents are severally liable to a fine of not more than \$500. The validity of the company's contracts is not affected, but it cannot maintain suit until it shall have complied with the statutory requirements.

MICHIGAN

A delinquent corporation is subject to a fine of not less than \$100, and not more than \$1,000, for each month that it transacts

business without complying with the statutory requirements. Its contracts are not valid until it complies with these requirements, and holds a certificate to that effect from the Secretary of State.

MINNESOTA

Fine of \$1,000. Inability to sue.

MISSOURI

Fine of not less than \$1000. Inability to sue.

MONTANA

A delinquent corporation and its agents are guilty of a misdemeanor. Its contracts are unenforceable.

NEBRASKA

A delinquent corporation is liable to a fine of \$1,000, and its agents to a fine of not more than \$25.

NEVADA

A delinquent corporation and its agents are severally liable to a fine of not less than \$500. It may not sue or defend any action in the Nevada courts until it shall have fully complied with the laws.

NEW HAMPSHIRE

No statutory provisions.

NEW JERSEY

A delinquent corporation is liable to a fine of \$200 for each offense. It may not sue on any contract made in New Jersey until it shall have obtained a certificate of compliance from the Secretary of State.

NEW MEXICO

Fine of \$200 for each offense. Inability to sue.

NEW YORK

A foreign corporation cannot maintain any action in New York upon any contract made by it there before complying with the laws.

NORTH CAROLINA

Fine of \$500.

NORTH DAKOTA

A delinquent corporation's contracts cannot be enforced by it, but may be enforced against it. Its officers, agents, and stockholders are jointly and severally liable on all contracts made in North Dakota while the corporation is in default.

OHIO

Fine of \$1,000, and of \$1,000 additional for each month during which a corporation fails to comply with the laws. Inability to sue.

OREGON

A corporation is unable to sue until it complies with the law.

OKLAHOMA

Inability to sue.

PENNSYLVANIA

Inability to sue. A delinquent company's agent, employee, or officer is liable to a fine of not more than \$1,000, or not more than thirty days' imprisonment, or both.

PHILIPPINE ISLANDS

Corporations are unable to sue unless they shall have complied with the law. A delinquent company's agent, director, or officer is liable to a fine of not less than 200 pesos or more than 1,000 pesos, or imprisonment for not less than six months or more than two years, or both.

PORTO RICO

Fine of \$10 for each day a corporation neglects to comply with law.

RHODE ISLAND

Inability to sue. Any person acting as agent or officer of any foreign corporation which has not complied with the law may be fined \$1,000.

SOUTH CAROLINA

A delinquent corporation and its agents are severally liable to a fine of \$500.

SOUTH DAKOTA

Foreign corporations are unable to sue unless they have complied with the laws. A delinquent company's agents and officers are liable to a fine of not less than \$10, or more than \$100, or imprisonment for not less than ten or more than thirty days, or both.

TENNESSEE

Fine of not less than \$100, or more than \$500. Inability to sue.

TEXAS

A corporation is unable to sue unless at the time the cause of action arose the corporation had complied with the laws.

UTAH

An offending corporation is denied the benefits of the Utah corporation laws. Its resident agent is guilty of a misdemeanor and is personally liable on all corporate contracts.

VERMONT

A foreign corporation may not sue in the Vermont courts unless it has complied with the law.

VIRGINIA

A delinquent corporation is liable to a fine of not less than \$10, or more than \$1,000. Its agents, employees, and officers are personally liable for any fines imposed.

WASHINGTON

Fine of \$250.

WEST VIRGINIA

Fine of not less than \$500, or more than \$1,000, for each month's neglect.

WISCONSIN

Fine of \$500. Inability to sue.

WYOMING

A delinquent company's agents, officers, and stockholders are personally liable on all its contracts. The corporation forfeits all right to do business, but its rights may be restored upon payment of \$5 for each day it has been in default.

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